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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMODITIES EXPORT CO.,

Petitioner,

V

THE UNITED STATES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

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Dated: November 5, 1992

QUESTIONS PRESENTED

Does the US Court of International Trade have jurisdiction over duty-free store cases?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMODITIES EXPORT CO.,

Petitioner,

V

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Commodities Export Co.[1] requests that a writ of certiorari issue to review the decision (A1-14)[2] of the United States Court of Appeals for the Federal Circuit entered on August 11, 1992.

OPINIONS BELOW

The opinion (A1-14) of the United States Court of Appeals

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[1]Commodities Export Co., a duty-free store, is a Michigan Corporation. It has no parent or subsidiary company.

[2]References to page numbers of the Appendix are preceded by "A" followed by the page numbers. Thus, "A1-14" is a reference to pages 1 through 14 of the Appendix.

for the Federal Circuit in this case is reported as *US v Commodities Export Co*, 972 F2d 1266 (Fed Cir 1992). The first (A16-29) and second (A30-41) opinions of the United States Court of International Trade in this case are reported as *US v Commodities Export Co*, 733 F Supp 109 (CIT 1990) (*Commodities I*) and *US v Commodities Export Co*, 755 F Supp 418 (CIT 1991) (*Commodities II*), respectively.

JURISDICTION: PETITION FOR WRIT OF CERTIORARI

The opinion (A1-14) and judgment (A15) of the Federal Circuit were entered on August 11, 1992. Under SCR's 13.1 and 30.1, the 90 days to file a timely petition for writ of certiorari expires on Monday, November 9, 1992. The Supreme Court's jurisdiction is based upon 28 USC 1254(1).

STATUTES INVOLVED: 28 USC 1582(2) AND 19 USC 1555(a), 1557(a)

28 USC 1582(2) provides:

§ 1582. Civil actions commenced by the United States

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States - ...
>
> > **(2)** to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or....

Pursuant to SCR 14(f), the full text of 28 USC 1582 appears at A51-52, 19 USC 1555 at A44-49, and 19 USC 1557 at A49-51.

I. STATEMENT OF THE CASE

This is the *first* duty-free store case brought in the CIT.

This case involves the operation of a bonded warehouse by a duty-free store. Customs sought to collect $6,293.96 in liquidated damages upon Commodities' warehouse bond because of 37 alleged marking errors and alleged inventory shortages in seven entries.

On March 17, 1989, the Government (on behalf of the US Customs Service ["Customs"]) sued Commodities Export Company ("Commodities") and its surety, Old Republic Insurance Company ("Old Republic"), in the United States Court of International Trade ("CIT") under 28 USC 1582(2) to collect $6,293.96 in liquidated damages because Commodities had allegedly breached its warehouse bond.

Commodities is a duty-free store which operates exclusively in export by selling tax- and duty-free foreign and domestic goods to travelers immediately departing the United States for Canada via the Ambassador Bridge in Detroit, Michigan. Commodities uses its Customs bonded warehouse to *temporarily* store these goods pending their immediate exportation from the United States in the possession of Commodities' customers.

Commodities and Old Republic moved to dismiss for lack of subject matter jurisdiction. 28 USC 1582(2) (A51-52) mandates that the action (1) be commenced by the United States, (2) that it arise "out of an import transaction," and (3) that the bond relate "to the importation of merchandise." The latter two prerequisites were never met. The CIT denied the motion on March 14, 1990. *US v Commodities Export Co*, 733 F Supp 109 (CIT 1990) (*Commodities I*) (A16-29).

Commodities and Old Republic then moved to dismiss

because (1) Customs had liquidated all the entries upon which the liquidated damages were based tax- and duty-free prior to October 15, 1983 pursuant to 19 USC 1514 and (2) the action was time barred by either 19 USC 1621 or 28 USC 2415(a).

The purpose of Commodities' bond is to guarantee that goods removed from Commodities' warehouse are exported from the United States. When Customs liquidated the warehouse entries upon which this action was based tax- and duty-free, that constituted a statutory admission under 19 USC 1514(a) that the goods in question had been exported from the United States and that the terms of the bond had been fully satisfied and, therefore, this action is barred.

19 USC 1621 imposes a five (5) year Statute of Limitations on penalties. 19 USC 1623(b)(1) and 19 CFR 113.2(a) define bond liquidated damages as penalties. Customs discovered Commodities' purported breach of its warehouse bond on February 22, 1983 but did not file this action in the CIT until March 17, 1989, *more than six years later!*

28 USC 2415(a) imposes a six (6) year Statute of Limitations on contract actions.

On January 9, 1991, the CIT denied this second motion to dismiss. *US v Commodities Export Co*, 755 F Supp 418 (CIT 1991) (*Commodities II*) (A30-41).

On April 15-16, 1991, a jury trial took place. The quintessence of the Government's case were its computer records which were all *summaries* and which the CIT admitted into evidence over defendants' timely and proper objection of no foundation and timely and proper motion for involuntary

dismissal/directed verdict.[3] At its conclusion, "the jury affirmed the validity of the bond agreement and found that Commodities had breached the bond. On May 14, 1991, the court entered judgment [A42-43] in favor of the United States." *US v Commodities Export Co*, 972 F2d 1266 (Fed Cir 1992) (A5-6). The jury made no determination of damages.

Commodities and Old Republic appealed. On August 11, 1992, the Federal Circuit REVERSED: since this action was founded upon a contract, it was time barred under 28 USC 2415(a) (A9-14). 19 USC 1621 was not applicable to this case because liquidated damages are not penalties if reasonable and difficult to prove (A9). The Federal Circuit again failed to address and confront the unambiguous definitions of liquidated damages as penalties found in 19 USC 1623(b)(1) and 19 CFR 113.2(a) (text *infra*, p 19). The Federal Circuit explicitly affirmed the CIT's jurisdiction under 28 USC 1582(2) (A6-9, 14).

From the pleadings filed in this appeal, the Federal Circuit was fully aware that there were other Commodities cases

---

[3]FRE 1006 mandates a foundation for summaries. Commodities files its warehouse entry and withdrawal documents with Customs from which Customs claimed it derived its computer printouts. However, Customs alone has the responsibility for correctly entering data into its computer system on time. Customs admitted under oath at trial that (1) it had no data base to support its computer printouts, (2) that Commodities had nothing to do with data entry into Customs computer system, and (3) that such data entry was performed by "contract workers." The entire question of whether or not Commodities had breached its bond devolved upon these Customs computer records. Customs could not even quantify the alleged marking errors without these computer records. Had these records been excluded from evidence, as they should have, Customs would have had no case. The jury's verdict in this case, based on inadmissible evidence to which defendants timely and properly objected, proves nothing. This issue was raised on appeal to the Federal Circuit but never addressed.

pending in the CIT wherein the issue of jurisdiction was of paramount importance. The Federal Circuit's adverse ruling on jurisdiction therefore creates further cases and controversies on this issue. Commodities is compelled to petition for a writ of certiorari or accept the Federal Circuit's ruling as binding precedent.

Pursuant to SCR 14.1(i), Commodities submits that the court of first instance in this case, to wit, the United States Court of International Trade ("CIT") does *not* have subject matter jurisdiction over this action pursuant to 28 USC 1582(2) because duty-free stores do not import, nor engage in import transactions, nor do their bonds relate to importation of merchandise.

II. ARGUMENT:
Why writ of certiorari should issue.

A. Under 28 USC 1582(2), the CIT only has jurisdiction over cases which arise out of an "import transaction" "to recover upon a bond relating to the importation of merchandise." Duty-free stores do not engage in "import transaction[s]" nor do their bonds relate to the "importation of merchandise." The Federal Circuit completely misstated the issue when it asserted (A6-7): "The second and third elements require this court to construe the terms "import transaction" and "importation." Specifically this court must determine whether foreign goods in a bonded warehouse are "imported" within the meaning of 28 U.S.C. § 1582(2)."

The issue in this case is what constitutes an "import transaction" and a bond that relates to the "importation of merchandise" under 28 USC 1582(2) and does a duty-free store's operation of a bonded warehouse and its bond fall within these definitions.

In ruling that the CIT had jurisdiction over this case under 28 USC 1582(2), the Federal Circuit relied on: 19 USC 1557(a) (A49-50), 19 USC 1555(a) (A44), *RJ Reynolds Tobacco Co v Durham County*, 479 US 130 (1986), *Xerox Corp v County of Harris*, 459 US 145 (1982), *Cunard SS Co v Mellon*, 262 US 100 (1923). (A6-9.)

The Federal Circuit's reasoning is simplistic (A7):

> Thus [citing 19 USC 1557(a), 1555(a)], goods in bonded warehouses are "imported" upon entry into this country and storage in a bonded warehouse....

A8-9:

> Two-thirds of the merchandise in Commodities' warehouse is foreign. By bringing this merchandise into the United States, Commodities conducted an "import transaction." This civil action thus "arises out of an import transaction," satisfying the second jurisdictional requirement of 28 U.S.C. § 1582(2).
>
> Finally, the bond in this case relates to importation in at least two ways. The bond's terms deal with Commodities' documentation and manipulation of *imported* merchandise in its warehouse. The bond also ensures payment of duties on *imported* merchandise in the event those duties become payable. Therefore, Commodities' bond "relat[es] to the importation of merchandise," satisfying the third element of 28 U.S.C. § 1582(2). The trial court therefore properly exercised jurisdiction over this action. (Emphasis added.)

19 USC 1557(a) (49-50) and 19 USC 1555(a) (A44) imply that *all* goods in bonded warehouses are "imported." From this, the Federal Circuit implies that all *foreign goods* are "imported" merely because they entered the United States and the "bringing...into the United States" by itself is the "import

transaction." This is untrue.[4]

Duty-free stores temporarily store both domestic and foreign goods in their bonded warehouses pending their immediate exportation from the United States in the possession of travelers departing the United States who buy the goods from the duty-free store.

The foregoing is a constant in the duty-free industry which represents the whole "transaction" which must be examined for purposes of determining "import transaction" under 28 USC 1582(2). See A51-51. The Federal Circuit only examined the first half which in essence holds that foreign goods are imported into the United States the instant they enter the United States. (A6-9.)

Arguendo, if weight is to be given to the Federal Circuit's ruling and the authority cited by it that foreign goods are to be deemed imported into the United States merely because they entered the United States, then what happens next? What follows?

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[4]A Danish tourist arrives at Dulles International Airport with a new Nikon camera purchased in Copenhagen to take snapshots of his two week vacation in the US after which he will return to Denmark with his pictures and Nikon. Was the Nikon imported?

A train loaded with Canadian goods goes from Toronto to Mexico City via the US. Were the Canadian goods imported?

The zoo in Toledo, Ohio, hosts a panda bear exhibit during the summer for which it charges admission after which the pandas are returned to China. Were the pandas imported?

A foreign museum sends its art works on a tour of the United States after which the art is returned to the foreign museum. Were the art works imported?

The answer to all of these questions is "No."

No one brings foreign goods across the US border just for the sake of bringing them across. If after bringing them across, the foreign goods are injected into the US stream of commerce, an *import transaction* has occurred. If the foreign goods are sent back across the border - out of US jurisdiction - *and never enter the US stream of commerce,* then *no import transaction* has occurred.

An *import transaction* is the totality of events by which foreign goods enter US jurisdiction and are then injected into the stream of commerce of the United States. The whole object of importation, the whole point of being an importer, is to inject foreign goods into the stream of commerce of the US. A legal definition of "import transaction" and "importation" which fails to address this essential element is meaningless.

Commodities like all other duty-free stores is in the business of taking the goods, both foreign and domestic, stored in its bonded warehouse out of that warehouse for purposes of sale to travelers immediately departing the United States for a foreign country. So even if the Federal Circuit were correct (which it is not) that 19 USC 1555(a) by its use of the term "imported merchandise" and 19 USC 1557(a) by its use of the term "importation" and the allusions thereto found in *RJ Reynolds Tobacco Co v Durham County,* 479 US 130 (1986) and in *Xerox Corp v County of Harris,* 459 US 145 (1982), prove that the goods in the bonded warehouses of duty-free stores are "imported," this neither proves nor establishes that duty-free stores engage in "import transaction[s]" nor that this action "arises out of an import transaction" which is mandatory under 28 USC 1582.

The language in 19 USC 1555(a) (19 USC 1555 in 1930) and in 19 USC 1557(a) upon which the Federal Circuit relies went into effect on June 17, 1930. Nevertheless, on December 17, 1931, 18 months later, the Federal Circuit's predeces-

sor, the United States Court of Customs and Patent Appeals ruled clearly and unequivocally in *Stone & Downer et al v US*, 19 CCPA 259, 264 (1931), *cert den*, 287 US 619 (1932):

> No principle is better settled in this court than the one that goods in bonded warehouses are not to be considered as *imported* until a permit of delivery has been issued *and they enter into the commerce of the country.* A mere citation of but a few authorities will suffice: *Casazza & Bro. v. United States*, 13 Ct. Cust. Appls. 627, T.D. 41481; *Hartranft v. Oliver*, 125 U.S. 525; *Five Per Cent Cases*, 6 Ct. Cust. Appls. 291, T.D. 35508, and cases therein cited. (Emphasis added.)

This is a fundamental axiom applicable to all bonded warehouses. There is nothing in *Stone* which supports the Federal Circuit's theory that this axiom is premised upon or restricted to "the timing of duty payments" or the "timing of duty assessments." The Federal Circuit misconstrued and misapplied *Stone* when it claimed (A8):

> Because this appeal does not concern the timing of duty assessments, *Stone & Downer* is not applicable.

As George W. Wickersham, the Attorney General of the United States stated, 27 OAG 440, 446 (1909):

> As above shown, under the general customs laws, *the entering of merchandise for immediate exportation and without any intent that it shall enter the commerce of the country, is not an importation.* This principle has likewise been often held by the courts, the following being some of the cases in which it may be found:
>
> *Marriot v Brune* (9 How. 619, 621).
>
> *Kidd v Flagler* (54 Fed. 367).
>
> *The Mary* (16 Fed. Cases 932).
>
> *United States v. Lyman* (16 Fed. Cases 1024, 1028). (Emphasis added.)

Duty-free stores first appeared in the US at the end of the

1950's - *some 30 years after 19 USC 1555(a) (A44) (19 USC 1555 in 1930) and 19 USC 1557(a) (A49-50) went into effect.* On September 7, 1988, 19 USC 1555(b) (A45-49) which is the only statute dealing with duty-free stores went into effect. 19 USC 1555(b) neither directly nor by implication says anything about "import transaction," "importation of merchandise," "imported goods/merchandise," "importation," or "imports." Instead it emphasizes the *export* nature of duty-free stores.

The opening phrase of 19 USC 1555(a) (A44) states: *"Subject to subsection (b) of this section...."* (Emphasis added.) 19 USC 1557 says nothing about duty-free stores.[5] 19 USC 1555(b)(7) (A48) states:

> The Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises. Regulations issued to carry out this paragraph shall take into account the *unique characteristics* of the different types of duty-free sales enterprises. (Emphasis added.)

The principal unique characteristic of duty-free stores is that they operate solely and exclusively in export. Customs has just recently issued regulations explicitly for duty-free stores as mandated by 19 USC 1555(b)(7). In view of 19 USC 1555(b) and in particular 19 USC 1555(b)(7), 19 USC 1555(a) and 19 USC 1557(a) and references thereto by case authority which *preceded* the effective date of 19 USC 1555(b) (i.e., September 7, 1988) may be irrelevant to this case. It is unrealistic for the Federal Circuit to hold that

---

[5]The Federal Circuit stated (A4): "Commodities stores its merchandise in a bonded warehouse under 19 U.S.C. § 1557(a)....(A7) Similarly, section 1555(a) of Title 19--the statute authorizing Commodities' and Old Republic's bond--refers to "imported" merchandise in customs bonded warehouses." Commodities' bond makes no reference to 19 USC 1557, nor any of its subdivisions. Commodities bond is pursuant to 19 USC 1555 but no subdivision is specified.

Congress intended statutes passed in 1930 to apply to duty-free stores which did not appear on the American scene until 30 years later.

One-third of what Commodities stores in its bonded warehouse and sells in export is domestic liquor such as Jack Daniels which is distilled in Tennessee and Old Grand Dad which is distilled on the outskirts of Cincinnati, Ohio. To a greater or lesser extent, this is true of all US duty-free stores and has been done since their inception with the full knowledge and approval of Customs.

Again, *arguendo,* if 19 USC 1555(a) and 19 USC 1557(a) mean that only "imported merchandise" may be stored in bonded warehouses including those operated by duty-free stores, then that must mean that Jack Daniels and Old Grand Dad are "imported" when they are stored in Commodities' warehouse. Neither the Federal Circuit nor the CIT has addressed or explained this contradiction. Moreover, if Commodities restricted its sales to domestic liquor, would 19 USC 1555(a) and 19 USC 1557(a) as the Federal Circuit's claimed underpinning for 28 USC 1582 nevertheless bestow subject matter jurisdiction on the CIT?

There is no statutory grant of subject matter jurisdiction to the CIT which includes the duty-free industry. In the absence of such a grant, both the Federal Circuit and the CIT have erroneously assumed that because Customs *supervises* duty-free stores that this *ipso facto* grants subject matter jurisdiction to the CIT. However, the CIT is a court of limited jurisdiction. If there is no explicit statutory grant, there is no jurisdiction. See *Dennison Mfg Co v US Dept of the Treasury,* 678 F Supp 894, 896 (CIT 1988); *K-Mart Corp. v. Cartier, Inc.,* 485 U.S. 176, 187 (1988)

Of the case authority cited by the Federal Circuit, only

Xerox and *Reynolds*, deal with bonded warehouses.[6]

Xerox Corp v County of Harris, 459 US 145, 154 (1982) on which the Federal Circuit inappropriately relies, supports *Stone* and adopted with approval the following language from *District of Columbia v International Distributing Corp*, 118 US App DC 71, 331 F2d 817 (1964), quoting: *Id.*, pp 73-74, 331 F2d, pp 819-820:

> The Court of Appeals quoted with approval the following language of the Tax Court:
>
> "'The idea of bonded warehouses and their use by the United States custom authorities negatives the proposition that at the time of sale the alcoholic beverages were in the possession of the petitioner [the corporation]. True it is that the private bonded warehouse was physically in the District of Columbia; and the liquors were stored therein; and in that sense they were in the District. In law, however, they were still without that jurisdiction, and did not become subject thereto until they had been withdrawn from the private bonded warehouse and removed from the control of the customs official.'"

---

[6]Both of these cases involved the constitutionality of the imposition of local ad valorem taxes on goods stored in Customs bonded warehouses.

In *Reynolds*, the foreign tobacco stored in Reynolds' Customs bonded warehouse was consistently withdrawn, duty paid, and used in Reynolds' manufacture of tobacco products in the US. In *Xerox*, copiers assembled in Mexico to various Latin American specifications with US made parts were stored temporarily in a Customs bonded warehouse in Houston pending exportation from the US to Xerox's Latin American affiliates.

In *Reynolds*, the tax was ruled constitutional because the foreign tobacco was actually withdrawn and used in Reynolds' US production of tobacco products. In *Xerox*, the tax was ruled unconstitutional because the copiers were never sold domestically but were exported to Xerox's Latin American affiliates.

and concluded that:

> *International Distributing Corp.* merely confirms what this Court said in 1877 in *Fabbri v. Murphy*, 95 U.S., at 197-198: "Congress did not regard the *importation as complete* while the goods remained in the custody of the proper officers of customs." (Emphasis added.)

As noted *supra*, p 13, in *Reynolds*, the foreign tobacco stored in Reynolds' Customs bonded warehouse was consistently withdrawn, duty paid, and used in Reynolds' manufacture of tobacco products in the US.

Cunard SS Co v Mellon, 262 US 100 (1923) did not involve a bonded warehouse but it forms an interesting part of American history:

> MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.
>
> These are suits by steamship companies operating passenger ships between United States ports and foreign ports to enjoin threatened application to them and their ships of certain provisions of the National Prohibition Act. The defendants are officers of the United States charged with the act's enforcement. In the first ten cases the plaintiffs are foreign corporations and their ships are of foreign registry, while in the remaining two the plaintiffs are domestic corporations and their ships are of United States registry. All the ships have long carried and now carry, as part of their sea stores, *intoxicating liquors intended to be sold or dispensed to their passengers and crews at meals and otherwise for beverage purposes. Many of the passengers and crews are accustomed to using such beverages and insist that the ships carry and supply liquors for such purpose. By the laws of all the foreign ports at which the ships touch this is permitted and by the laws of some it is required. The liquors are purchased for the ships and taken on board in the foreign ports and are sold or dispensed in the course of all voyages, whether from or to those ports....* (Emphasis added.)

Cunard, 119.

> *While the construction and application of the National Prohibition Act is the ultimate matter in controversy, the act is so closely related to the Eighteenth Amendment, to enforce which it was enacted, that a right understanding of it involves an examination and interpretation of the Amendment. The first section of the latter declares, 40 Stat. 1050, 1941:*
>
> *"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited...."* (Emphasis added.)

Cunard, 121.

> It therefore is of no importance that the liquors in the plaintiffs' ships are carried only as sea stores. Being sea stores does not make them liquors any the less; *nor does it change the incidents of their use as beverages. But it is of importance that they are carried through the territorial waters of the United States and brought into its ports and harbors. This is prohibited transportation and importation in the sense of the Amendment and the act....* (Emphasis added.)

Cunard, 130.

The 18th Amendment and the National Prohibition Act are history. This Court no longer has a mandate to stop the consumption of intoxicating liquors or, put another way, to prevent the injection of intoxicating liquors into the US stream of commerce by their consumption "for beverage purposes."

The Federal Circuit cited *Reynolds*, *Xerox*, and *Cunard* in support of its assertion (A7):

> *The Supreme Court has adopted the language of Title 19 in referring to goods in bonded warehouses. R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 134 n.3 (1986) ("Goods may remain in a customs-bonded warehouse for up to five years from the date of importation...."); *see also Xerox Corp. v. County of Harris*, 459 U.S. 145, 150 (1982) ("Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods."); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923) ("If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act."). (Emphasis added.)

The Federal Circuit's blanket assertion about the Supreme Court's position is inaccurate and inappropriate. The quotations are at best dicta.

Moreover, all three of these cases, *when placed in context*, support *Stone*. Foreign goods are imported into the United States when they enter the United States and are injected into its stream of commerce. In the overwhelming majority of cases, these two events occur simultaneously without any differentiation but not in bonded warehouses where Customs retains jurisdiction and control until the goods are withdrawn and either injected into the US stream of commerce or exported. See *Xerox, supra*, p 13. It is the totality of these two events which constitutes an import transaction, i.e., foreign goods enter the United States and are injected into its stream of commerce. Foreign goods attain the status of "imports" or are "imported" at the completion of an import transaction.

B. Commodities' bond does not relate to the "importation of merchandise" as jurisdictionally mandated by 28 USC 1582(2).

In this regard, five points need to be emphasized.

First, if duty-free stores do not engage in "import transaction[s]," *a fortiori*, their bonds do not relate to the "importation of merchandise."

Second, under 28 USC 1582(2) the definitions of "import transaction" and "importation of merchandise" as it relates to bonds are not precisely the same. Nevertheless, they may not contradict each other. Yet the Federal Circuit has adopted contradictory definitions (A6-9). According to the Federal Circuit, "importation" for purposes of "import transaction" is when foreign goods enter the United States; "importation" for purposes of the bond relating to the "importation of merchandise" is when foreign goods "enter into domestic commerce" and "duties become payable." This is logically and legally impossible: "importation" cannot be both at the same time. At A7-8, the Federal Circuit states:

> In *Stone & Downer Co. v. United States*, 19 CCPA 259, 264 (1931), *cert. denied*, 287 U.S. 619 (1932), *this court's predecessor noted that "importation" has a different meaning for the timing of duty payments. Stone & Downer* clarified that Title 19 requires Customs to assess duties at the time foreign goods in a bonded warehouse enter into domestic commerce, rather than at the time these goods enter the warehouse. *Id. In that context, Customs collects duties on "imported" goods upon entry into domestic commerce....* (Emphasis added.)

As noted *supra*, p 10, this is a total misconstruction and misapplication of *Stone*. At A8-9, the Federal Circuit states:

> The bond also ensures payment of duties on imported merchandise in the event those duties become payable. Therefore, Commodities' bond "relat[es] to the importation of merchandise," satisfying the third element of 28 U.S.C. § 1582(2).

Third, there is only one bond at issue in this appeal and it covers *everything* in Commodities' warehouse. Most of what is stored in Commodities' warehouse is liquor, both foreign and domestic, all of which is subject to Internal Revenue tax *unless it is exported*. Commodities' bond specifically relates to the *exportation* of merchandise, not the importation of merchandise, because otherwise such storage of liquor would be in violation of 26 USC 5214(a)(9):

> (a) Purposes.
>
> Distilled spirits on which the internal revenue tax has not been paid or determined may, subject to such regulations as the Secretary shall prescribe, be withdrawn from the bonded premises of any distilled spirits plant in approved containers - ...
>
> (9) without payment of tax, for transfer *(for the purpose of storage pending exportation)* to any customs bonded warehouse from which distilled spirits may be *exported*, and distilled spirits transferred to a customs bonded warehouse under this paragraph shall be entered, stored, and accounted for under such regulations and *bonds* as the Secretary may prescribe, or.... (Emphasis added. Parentheses in original.)

Fourth, there is no reference in Commodities' bond to "importation," "import transaction," "imports," or any equivalent terms. This fact was noted by the CIT in its jurisdictional ruling of March 14, 1990, (*Commodities I*), (A28).

Fifth, duty-free stores operate exclusively in export. The purpose of Commodities' bond is, therefore, to guarantee that the goods in its warehouse are exported from the United States. The Federal Circuit misunderstood this concept (A4-5):

> As a duty-free sales enterprise, Commodities sells its merchandise in export only. *See* 19 U.S.C. § 1555 (b) (1988). Thus,

> Commodities sells its merchandise to persons immediately leaving the United States to enter Canada. *In the event of a sale to persons remaining in the United States, Commodities must collect duties. See United States v. Commodities Export Co.*, 733 F. Supp. 109, 110 (Ct. Int'l Trade 1990) (*Commodities I*). (Emphasis added.)
>
> "To insure payment of duties and other charges due to runaways and other infractions," the United States entered into a warehouse bond agreement with Commodities, as principal, and Old Republic Insurance, as surety. *Id.* Under the agreement, Commodities and Old Republic jointly and severally promised to pay liquidated damages of $100 for each violation of the bond's terms. Moreover, they agreed to pay liquidated damages of five times the duty and tax on any dutiable merchandise removed from the warehouse without the Customs Service's approval. The bond required Commodities to mark its merchandise correctly and to notify Customs of any inventory discrepancies.

Commodities never sells domestically. There is nothing in the record to support the contention that it does. A runaway is a customer who proceeds inland instead of to Canada. When this occurs, Commodities pays Customs liquidated damages for breach of the bond, not duties or taxes. Liquidated damages are penalties as defined by 19 USC 1623(b)(1) and 19 CFR 113.2(a):

19 USC 1623(b)(1):

> (b) Whenever a bond is required or authorized by a law, regulation, or instruction which the Secretary of the Treasury or the Customs Service is authorized to enforce, the Secretary of the Treasury may-
>
> > (1) Except as otherwise specifically provided by law, prescribe the conditions and form of such bond, and fix the amount of *penalty* thereof, whether for the payment of *liquidated damages* or of a penal sum:.... (Emphasis added.)

19 CFR 113.2(a):

> Whenever a bond is required or authorized by law, regulation, or instruction, the Commissioner of Customs may:
>
> (a) Prescribe the conditions and form of the bond and fix the amount of *penalty*, whether for the payment of *liquidated damages*, or of a penal sum, except as otherwise specifically provided by law. (Emphasis added.)

Liquidated damages are not duties or taxes. As noted, *supra*, they are at least five times or more the duty and tax applicable.

All Customs bonded warehouses require a bond. Runaways, which were never at issue in this case, have nothing to do with this requirement. A bond would still be required even if there were never any runaways.

When bonded warehouses are used to expedite and facilitate the importation of foreign goods into the United States, i.e., the injection of foreign goods into the US stream of commerce, the purpose of the warehouse bond is to guarantee the payment of taxes and duties due the Government. Practically all bonded warehouses operate for this purpose. The primary exception are duty-free store bonded warehouses which operate exclusively in export, i.e., goods both foreign and domestic removed from a duty-free store's bonded warehouse are sold tax- and duty-free to the customer who immediately departs the United States with those goods in his possession. Thus, the goods are exported. Thus, the purpose of the duty-free store's bond is to guarantee exportation of the goods in its bonded warehouse from the United States. See 26 USC 5214(a)(9), *supra*, p 18.

CONCLUSION

This is the *first* duty-free store case ever filed in the CIT.

Pursuant to SCR 10.1(c), the Federal Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court": duty-free stores do not conduct "import transaction[s]" nor do their bonds relate to the "importation of merchandise" as required by 28 USC 1582(2). Duty-free stores operate exclusively in export.

The writ of certiorari should issue to review the Federal Circuit's ruling affirming the subject matter jurisdiction of the CIT under 28 USC 1582(2) as it apples to duty-free stores.

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Dated: November 5, 1992

APPENDIX

972 F2d 1266 (Fed Cir 1992)
Nos. 91-1470, 91-1482

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V

COMMODITIES EXPORT CO.
Defendant-Appellant,

and

OLD REPUBLIC INSURANCE CO.,
Defendant-Appellant,

On Appeal from the United States
Court of International Trade

Decided and Filed August 11, 1992.

Government brought action to recover unpaid liquidated damages under customs warehouse bond. The United States Court of International Trade, Nicholas Tsoucalas, J., entered judgment in favor of government, and appeal was taken. The Court of Appeals, Rader, Circuit Judge, held that, under applicable six-year limitations period for actions founded on contract, action was time barred, as Customs' delay in bringing suit until after it had complied with regulations for demanding payment did not affect accrual of action.

Reversed.

1. Customs Duties #84(1)

In order to fall within exclusive jurisdiction of Court of International Trade, action to recover on bond must be begun by United States, must arise out of import transaction, and must relate to importation of merchandise required by laws of United States or by Secretary of Treasury.

2. Customs Duties #84(1)

For purposes of determining whether action to recover on bond falls within exclusive jurisdiction of Court of International Trade, foreign goods in bonded warehouse are "imported" on entry into United States. 28 U.S.C.A. §§ 1582, 1582(2).

3. Customs Duties #84(1)

For purposes of determining whether action to recover on bond falls within exclusive jurisdiction of Court of International Trade, bond related to importation of merchandise where it dealt with documentation and manipulation of imported merchandise in bonded warehouse and insured payment of duties on imported merchandise in event that duties became payable. 28 U.S.C.A. §§ 1582(2), 2415(a); Tariff Act of 1930, § 621, as amended, 19 U.S.C.A. § 1621.

4. Customs Duties #84(3)

Action to recover liquidated damages under terms of bond agreement was "founded upon a contract" and thus was subject to six-year limitation period and not five-year limitations period applicable to cases in which government sought pecuniary penalties accruing under customs law. 28 U.S.C.A. §§ 1582(2), 2415(a); Tariff Act of 1930, § 621, as amended, 19 U.S.C.A. § 1621.

5. Limitation of Actions #43

Under federal law governing statutes of limitations, cause of action accrues when all events necessary to state claim occur.

6. Limitation of Actions #47(3)

Action brought by government to recover unpaid liquidated damages under customs warehouse bond was time barred under six-year limitations period for actions founded on contract; fact that Customs unilaterally adopted regulations which delayed filing of action until Customs had given notice and waited 60 days for response did not change accrual of limitations period. 28 U.S.C.A. §§ 2415, 2416, 2416(c).

Mark S. Sochaczewsky, Atty., Commercial Litigation Branch, Dept. of Justice, New York City, argued, for plaintiff-appellee. With him on the brief, were Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director and Joseph I. Liebman, Atty. in Charge, Intern. Trade Field Office. Also on the brief was Michele L. Kenney, U.S. Customs Service, of counsel.

Roger E. Craig, Naples, Fla., argued, for defendant--appellant, Commodities Export Co. With him on the brief, was Walter H. Lubienski, Lubienski & Lubienski, Detroit, Mich. Wayne James Jarvis, Wayne Jarvis, Ltd., Chicago, Ill., argued, for defendant-appellant, Old Republic Ins. Co. With him on the brief was Michael G. Hodes, Hodes & Filon, Chicago, Ill., of counsel.

Before ARCHER, Circuit Judge, BENNETT, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

The United States sued Commodities Export Company and Old Republic Insurance Company in the United States Court of International Trade to recover unpaid liquidated damages under a customs warehouse bond. The trial court entered judgment in favor of the United States. *United States v. Commodities Export Co. & Old Republic Ins. Co.*, CIT No. 89-03-00144, May 14, 1991. Because the United States did not file its action within the six year statute of limitation, 28 U.S.C. § 2415 (a) (1988), this court reverses.

BACKGROUND

Section 1557 (a) of Title 19 (1988) allows an importer to store imported foreign merchandise in a bonded warehouse for up to five years from the date of importation without paying duties. An importer must pay duties on merchandise removed from storage for consumption within this country. *Id.* An importer pays no duties, however, on merchandise withdrawn from storage for export. *Id.*

Commodities sells both domestic and foreign goods from its duty-free store. This store lies directly adjacent to the Canadian border in Detroit. Commodities stores its merchandise in a bonded warehouse under 19 U.S.C. § 1557(a). As a duty-free sales enterprise, Commodities sells its merchandise in export only. *See* 19 U.S.C. § 1555 (b) (1988). Thus, Commodities sells its merchandise to persons immediately leaving the United States to enter Canada. In the event of a sale to persons remaining in the United States, Commodities must collect duties. *See United States v. Commodities Export Co.*, 733 F. Supp. 109, 110 (Ct. Int'l Trade 1990) (*Commodities I*).

"To insure payment of duties and other charges due to runaways and other infractions," the United States entered into a warehouse bond agreement with Commodities, as principal, and Old Republic Insurance, as surety. *Id.* Under

the agreement, Commodities and Old Republic jointly and severally promised to pay liquidated damages of $100 for each violation of the bond's terms. Moreover, they agreed to pay liquidated damages of five times the duty and tax on any dutiable merchandise removed from the warehouse without the Customs Service's approval. The bond required Commodities to mark its merchandise correctly and to notify Customs of any inventory discrepancies.

On February 22, 1983, Customs conducted a spot check of Commodities' warehouse. The investigation revealed that Commodities had not properly marked 37 warehouse entries and had not notified Customs of inventory shortages in seven entries. On March 21, 1983, Customs sent Commodities a demand for payment of liquidated damages for breach of the bond. *See* 19 C.F.R. 172.1 (a) (1982). The demand required Commodities to pay $6,293.96 or petition for relief within 60 days. On May 19, 1983, Commodities objected to the assessment of liquidated damages. Customs denied Commodities' petition on November 4, 1987. On November 20, 1987, Customs formally demanded payment by Old Republic within 30 days. On February 20, 1988, March 5, 1988, and March 19, 1988, Customs issued bills to Commodities and Old Republic for payment of the liquidated damages. Neither defendant paid Customs.

On March 17, 1989, the United States brought this action against Commodities and Old Republic to recover the unpaid liquidated damages. The trial court denied defendants' motion to dismiss for lack of subject matter jurisdiction. *Commodities I*. Defendants then moved to dismiss because the statute of limitations had run and because Customs had actually liquidated the goods duty-free. The trial court denied this motion also. *United States v. Commodities Export Co.*, 755 F. Supp. 418 (Ct. Int'l Trade 1991) (*Commodities II*).

At trial, the jury affirmed the validity of the bond agree-

ment and found that Commodities had breached the bond. On May 14, 1991, the court entered judgment in favor of the United States.

DISCUSSION

I.

Section 1582 of Title 28 (1988) sets forth exclusive jurisdiction for the Court of International Trade:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States-
>
> (1) to recover a civil penalty under section 592, 641 (b) (6), 641 (d) (2) (A), 704 (i) (2), or 734 (i) (2) of the Tariff Act of 1930;
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or
>
> (3) to recover customs duties.

Thus, to fall within the exclusive jurisdiction of the Court of International Trade, this action to recover on a bond must be "commenced by the United States," arise[] out of an import transaction," and "relat[e] to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." *Id.*

The United States' commencement of this action satisfies the first element. The second and third elements require this court to construe the terms "import transaction" and "importation." Specifically this court must determine whether foreign goods in a bonded warehouse are "imported" within the

meaning of 28 U.S.C. § 1582(2). The statutes governing bonded warehouses repeatedly refer to warehouse goods as imports. For instance, 19 U.S.C. § 1557(a) permits an importer to store merchandise in a bonded warehouse without payment of duties for up to five years from the date of "importation." Section 1557 thus considers goods imported upon their entry into this country, rather than upon payment of duties before merchandise enters domestic commerce.

Similarly, section 1555(a) of Title 19--the statute authorizing Commodities' and Old Republic's bond--refers to "imported" merchandise in customs bonded warehouses. Thus, goods in bonded warehouses are "imported" upon entry into this country and storage in a bonded warehouse. The importer need pay no duties to "import" merchandise stored in its warehouse. The Supreme Court has adopted the language of Title 19 in referring to goods in bonded warehouses. *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130, 134 n.3 (1986) ("Goods may remain in a customs--bonded warehouse for up to five years from the date of importation...."); *see also Xerox Corp. v. County of Harris,* 459 U.S. 145, 150 (1982) ("Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods."); *Cunard S.S. Co. v. Mellon,* 262 U.S. 100, 122 (1923) ("If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.").

In *Stone & Downer Co. v. United States,* 19 CCPA 259, 264 (1931), *cert. denied,* 287 U.S. 619 (1932), this court's predecessor noted that "importation" has a different meaning for the timing of duty payments. *Stone & Downer* clarified that Title 19 requires Customs to assess duties at the time foreign goods in a bonded warehouse enter into domestic commerce, rather than at the time these goods enter the ware-

house. *Id.* In that context, Customs collects duties on "imported" goods upon entry into domestic commerce. Because this appeal does not concern the timing of duty assessments, *Stone & Downer* is not applicable.

By referring to "import transaction" or "importation of merchandise," 28 U.S.C. § 1582 gave the Court of International Trade jurisdiction over bonded warehouses. The phraseology of section 1582 underscores the breadth of this jurisdictional grant. A civil action need only arise out of an import transaction to fall within the court's jurisdiction. Moreover a bond need only relate to importation. This broad language commits a wide spectrum of controversies concerning the importation process to the Court of International Trade.

The legislative history of section 1582 also supports the breadth of the jurisdictional grant to the Court of International Trade. The House report accompanying the 1980 rewrite of this provision described the court's jurisdiction as "a comprehensive system of judicial review of civil actions arising from import transactions." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731.

Under the terms of 28 U.S.C. § 1582 (2), this action against Commodities falls within the jurisdiction of the Court of International Trade. The United States brought the action. Two-thirds of the merchandise in Commodities' warehouse is foreign. By bringing this merchandise into the United States, Commodities conducted an "import transaction." This civil action thus "arises out of an import transaction," satisfying the second jurisdictional requirement of 28 U.S.C. § 1582(2).

Finally, the bond in this case relates to importation in at least two ways. The bond's terms deal with Commodities' documentation and manipulation of imported merchandise in its warehouse. The bond also ensures payment of duties on

...orted merchandise in the event those duties become payable. Therefore, Commodities' bond "relat[es] to the importation of merchandise," satisfying the third element of 28 U.S.C. § 1582(2). The trial court therefore properly exercised jurisdiction over this action.

II.

This court must next determine the statute of limitations which applies to this action. Section 1621 of Title 19 sets forth a five-year limitation on any "suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws." 19 U.S.C. § 1621 (1988). Section 2415(a) of Title 28 provides a six-year limitation on "every action...brought by the United States or an officer or agency thereof which is founded upon any contract." 28 U.S.C. § 2415(a).

The five-year statute of limitations in 19 U.S.C. § 1621 does not apply in this case because the United States does not seek "pecuniary penalt[ies]...accruing under the customs laws." *See also United States v. Imperial Food Imports*, 834 F.2d 1013, 1016, 6 Fed. Cir. (T) 37, 40 (1987) ("Liquidated damages are not penalties if they are reasonable and the exact amount of the damages sustained would be difficult to prove."). Rather, the United States brought this action to recover liquidated damages under the terms of a contract, the bond agreement. Because "founded upon [a] contract," this action falls within the language of 28 U.S.C. § 2415. Therefore, the trial court properly applied a limitations period of six years in this case.

III.

Finally this court must decide whether the United States filed this action within the applicable statutory period. Under 28 U.S.C. § 2415(a), the United States may not bring an

action "unless the complaint is filed within six years after the right of action accrues."

The trial court determined that the Government's right of action accrued on May 20, 1983, after Customs followed its own regulations. *Commodities II*, 755 F. Supp. at 422. In these regulations Customs imposes on itself the requirement to demand payment from a party who has not met the conditions of a customs bond. 19 C.F.R. § 172.1(a).[1] If that party does not pay within 60 days of Customs' mailing of notice, "the district director of Customs, after required collection action, shall refer the claim promptly to the United States attorney." 19 C.F.R. § 172.2(a) (1982).

As a general principle, this court recognizes that "[u]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *Chevron U.S.A. v. United States*, 923 F.2d 830, 834 (Fed. Cir.), *cert. denied*, 112 S. Ct. 167 (1991); *Nager Elec. Co. v. United States*, 368 F.2d 847, 851-52 (Ct. Cl. 1966). The Supreme Court also has long recognized this general rule. *United States v. Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence...."); *Unexcelled Chem. v. United States*, 345 U.S. 59, 65 (1953) ("A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling.").

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[1]It appears that Customs may not have adhered strictly to its regulations. Section 172.1(a) of Title 19 of the Code of Federal Regulations (1982) requires Customs to notify the surety of liability on the bond "at the same time as the principal." According to the original complaint in this action, the United States made a formal demand on Old Republic on November 20, 1987--over four years after it made a demand on Commodities. The only other evidence of record before this court on this issue, Customs' own automated billing record, gives November 16, 1987, as a date Customs made a demand on the surety.

This court must assess, however, the effect of Customs' regulations on this general rule for accrual of a right of action. In *Crown Coat Front Co. v. United States*, 386 U.S. 503, 509-11 (1967), the Supreme Court permitted a Government contract's disputes clause to delay accrual of a right of action arising under the contract. The contract bound the contractor to exhaust administrative remedies before instituting suit. *Id.* at 511-12. Where the parties had agreed in advance to a condition on the filing of a suit, the Supreme Court gave effect to that agreement by delaying accrual of the right of action.

In this ease, however, the parties have not agreed to conditions on institution of a suit, rather Customs has unilaterally adopted regulations which delay filing of actions. The bond agreement does not require Customs to demand payment or to send notice before suing Commodities or Old Republic. The bond does not require Customs to wait 60 days for a response to the demand before suing. Moreover, Customs' regulations do not state that commencement of the statutory period is postponed until after Customs gives notice and waits 60 days for a response. No statute requires Customs to give notice of demand for liquidated damages before suing. Without agreement of the parties or statutory obligations delaying the institution of suit, the general rule for accrual of a right of action still applies.[2]

The trial court erred in postponing commencement of the limitations period until after Customs complied with its own regulations. While Customs' self-imposed internal proce-

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[2]Under the bond agreement, Old Republic agreed to pay liquidated damages "[i]f principal defaults." The bond agreement did not require Customs to demand payment from Old Republic before suing. Thus, under the terms of the bond, Old Republic incurred liability to Customs when Commodities breached the bond. Customs' right of action against Old Republic therefore accrued at the same time its right of action accrued against Commodities.

dures, may constrain its right to sue, a question we do not decide here, they cannot change the defendants' right to repose after the statutory six-year period. Customs' internal procedures are a unilateral effort to settle the dispute without resort to legal action.[3] This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.

By its terms, 28 U.S.C § 2415 is subject also to statutory exceptions to the general rule regarding accrual of causes of action. The relevant statute, 28 U.S.C. § 2416 (1988), states:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which--
>
> ....
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act

---

[3]The Supreme Court has referred in dicta to 28 U.S.C. 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 (1967). The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident." *Id.* at 521 n.14 (citations omitted).

The intent of "equality" is not served by allowing the Government to unilaterally postpone accrual of a cause of action. A private corporation suing the Government may not stall the commencement of the statute of limitations merely with in-house proceedings which precede any lawsuit. Similarly, the Government may not indefinitely postpone the running of the statute merely by taking the steps any prudent litigant would take before bringing a lawsuit.

- in the circumstances....[4]

The language of section 2416(c) requires this court to examine the nature of the "facts material to the right of action." Only facts which could not reasonably be known by a relevant Government official postpone accrual. Under the facts of this case, relevant Government officials reasonably could have known of the cause of action before March 17, 1983. Thus, in the words of our sister circuits, "once the facts making up the 'very essence of the right of action' are reasonably knowable, the § 2416 bar is dropped." *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1250 (9th Cir. 1988) (quoting *United States v. Kass*, 740 F.2d 1493, 1497 (llth Cir. 1984) (quoting S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2508)).

Section 2416(c) does not postpone accrual of the Government's cause of action beyond March 17, 1983. On February 22, 1983, Customs inspected Commodities' warehouse. These inspecting officials found that Commodities had not marked some merchandise with proper warehouse entry

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[4]While acknowledging that this subsection would primarily apply to cases of fraudulent concealment of Government causes of action, Congress recognized that the complexities and size of the Government could impede responsible officials' knowledge of material facts. S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2507; *see also United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984). The legislative history of section 2416(c) explains:

> It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose.

S. Rep. No. 1328 at 6.

numbers. The absence of the markings breached the bond. Simply viewing the boxes made this blatant breach apparent. Thus, because the Government's right of action accrued before March 17, 1983, this action is time barred.

CONCLUSION

The Court of International Trade properly asserted jurisdiction over this action. That court also applied the proper statute of limitations. However, that court erred in finding that the Government had filed its action within the six-year time bar.

REVERSED.

Nos. 91-1470, 91-1482

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V

COMMODITIES EXPORT CO.
Defendant-Appellant,

and

OLD REPUBLIC INSURANCE CO.,
Defendant-Appellant,

JUDGMENT

On Appeal from the U.S. Court of International Trade
In Case No(s). 89-03-00144

This cause having been heard and considered, it is ORDERED and ADJUDGED:

REVERSED.

ENTERED BY ORDER OF THE COURT
Francis X. Gindhart, Clerk

Dated: August 11, 1992

Issued as a Mandate: September 3, 1992

733 F Supp 109 (CIT 1990)
No. 89-03-00144

United States Court of International Trade

UNITED STATES OF AMERICA,

Plaintiff,

V

COMMODITIES EXPORT CO. and
OLD REPUBLIC INSURANCE CO.,

Defendants,

Decided March 14, 1990

United States brought action on behalf of the Customs Service to recover unpaid liquidated damages from a duty--free shop and its surety in connection with an alleged breach of a warehouse bond. The Court of International Trade, Tsoucalas, J., held that action arose out of import transaction and warehouse bond related to importation of merchandise, as required for subject matter jurisdiction.

Ordered accordingly.

1. Customs Duties #84(1)

Court of International Trade, in action brought by United States Customs Service to recover unpaid liquidated damages for duty-free shop's alleged breach of warehouse bond, would not defer its decision as to whether it had jurisdiction until district court determined whether it had jurisdiction in action brought by defendant in district court; cases asked for separate and distinct relief and, if Court of International

Trade had jurisdiction, its jurisdiction would be exclusive. 28 U.S.C.A. § 1582(2).

2. Customs Duties #84(1)

Jurisdiction of Court of International Trade is exclusive and does not depend on assertion of jurisdiction by district court. 28 U.S.C.A. § 1582.

3. Customs Duties #87

Action to recover unpaid liquidated damages for duty-free shop's alleged breach of warehouse bond was properly characterized as arising out of "import transaction," as required for Court of International Trade to have subject matter jurisdiction; shop stored foreign-made goods in bonded warehouse and, as party liable for payment of customs duties and taxes in event that stored goods were injected into United States commerce in violation of bond, shop was rightly classified as "importer." 28 U.S.C.A. § 1582(2).

4. Customs Duties #87

Warehouse bond allegedly breached by duty-free shop which stored foreign-made goods at bonded warehouse was bond "relating to the importation of merchandise," as required for Court of International Trade to have jurisdiction over dispute arising out of alleged breach of bond, even though bond did not refer to importation; bond clearly was designed to deal with instances where duty-free goods had in fact entered into stream of commerce of United States without payment of appropriate duties and taxes. 28 U.S.C.A. § 1582(2).

Stuart M. Gerson, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S.

Department of Justice, and Mark S. Sochaczewsky, New York City, for plaintiff.

Lubienski, Lubienski & Lubienski, Walter H. Lubienski, Detroit, Mich., and Roger E. Craig, Naples, Fla., for defendants.

OPINION

TSOUCALAS, Judge:

Plaintiff brings this action on behalf of the United States Customs Service to recover unpaid liquidated damages in the amount of $6,293.96, plus interest, from defendants, Commodities Export Co. ("Commodities") and its surety, Old Republic Insurance Co. ("Old Republic").

The issue at hand is whether this Court has subject matter jurisdiction over a dispute arising out of an alleged breach of a warehouse bond by defendant, a duty-free shop. Plaintiff maintains the court has jurisdiction based on 28 U.S.C. § 1582 (2) (1982), which states in part:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States -
>
> ...
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury;

Defendants contest subject matter jurisdiction, claiming the transaction in question is not an "import transaction" within the meaning of the statute because duty-free shops are not importers and do not engage in "import transactions."

Background

Commodities is a duty-free store which operates a private, Class 2, bonded warehouse as an essential part of its business. Bonded warehouses are used by duty-free stores to expedite the exportation of goods from the United States. Duty-free stores place goods in these warehouses and sell in export from their retail stores. Commodities sells both foreign and domestic goods. According to its submissions, foreign-made goods account for two-thirds (2/3) of the goods Commodities sells.

Commodities operates from a location across from the Ambassador Bridge in Detroit, Michigan. The bridge leads directly into Canada and Commodities sells goods to consumers going directly into Canada. If the goods leave the warehouse but do not go directly into Canada, they have entered the stream of commerce of the United States without any import duties having been paid on them as required by the laws of the United States. Such goods are known as "runaways." Because of this potential problem, Customs keeps a close watch on duty-free shops and traditionally controlled their recordkeeping. However, in 1982, Customs put duty-free stores on an "honor system" whereby the owners of the bonded warehouses would henceforth be responsible for the recordkeeping, subject to "spot checks" by Customs officials. To insure payment of duties and other charges due to runaways and other infractions, the owners of the warehouses are required to post with Customs a warehouse bond pursuant to 19 U.S.C. § 1555 (1988).[1]

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[1]19 U.S.C. § 1555(a) provides:

...Before any imported merchandise not finally released from customs custody shall be stored in any [bonded warehouse], the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit,

On December 1, 1982, Commodities and its surety, Old Republic, executed and delivered to Customs a Proprietors Warehouse Bond for Storage and Manipulation of Merchandise, Class 2 ("bond"), in accordance with 19 U.S.C. § 1555, in the amount of $50,000. Under the terms of the bond, defendants promised that for each failure to comply with the terms of the bond they would pay liquidated damages of $100.00. Additionally, if any merchandise was removed from the warehouse without Customs' approval, defendants would pay liquidated damages equal to five (5) times the duty and tax due on the goods. Bond, Condition 5(g). Defendants further agreed to notify Customs in writing by the close of business the next business day if they discovered any discrepancy in their merchandise. Bond, Condition 5(f). Further, defendants, in accordance with the provisions of the bond, agreed to "[m]ark each package with the correct general order number, warehouse entry number, or seizure number and the corresponding date" and to segregate them by such number. Bond, Conditions 2(b)(c) and (d).

On February 22, 1983, Customs officials conducted a "spot check" inspection of Commodities' warehouse and found a number of irregularities. The inspectors discovered that thirty seven (37) warehouse entries were not marked properly, and seven (7) entries contained shortages. These were held to constitute defaults under Conditions 2(b) and 5(g) of the bond, respectively.

Customs subsequently demanded payment of liquidated damages as provided for in the bond. The amount assessed against Commodities was $6,293.96, the amount at issue in this case. Customs repeatedly issued bills for the sum to Commodities and later to its surety, Old Republic. No payment was ever received for this amount, nor was a protest

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storage, or manipulation of merchandise in such warehouse.

filed under 19 U.S.C. § 1514 (1988).[2]

On March 29, 1988, Commodities petitioned the United States District Court for the Eastern District of Michigan for injunctive relief against the liquidated damage claims assessed by Customs. The District Court granted Customs' motion to dismiss the case on the basis that the Court of International Trade has exclusive jurisdiction over the contested issues.[3]

On March 17, 1989, Customs commenced this action to recover unpaid liquidated damages in the amount of $6,293.-96, plus interest. Defendants contest this Court's subject matter jurisdiction on the basis of their claim that, as a duty-free store, they are not importers, they do not engage in import transactions and thus they cannot be sued in this Court under 28 U.S.C. § 1582(2). They also assert that since the District Court may yet decide it has jurisdiction over the case brought by Commodities, this Court should refrain from exercising its jurisdiction.

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[2]The relevant provisions of 19 U.S.C. § 1514 provide that decisions of the appropriate customs officers regarding, *inter alia*,

> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> ...
>
> shall be final and conclusive...unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade....

[3]The United States Court of Appeals for the Sixth Circuit vacated the judgment of the District Court and remanded the case for further consideration of a number of issues, including a due process argument made by Commodities. *Commodities Export Co. v. United States Customs Service*, 888 F.2d 431 (1989). The District Court has not yet issued its decision on remand.

Discussion

[1] Defendants argue that this Court should await the outcome of the District Court case. The Court disagrees. The two cases, one brought by Commodities in the District Court and one brought by Customs in this Court, ask for separate and distinct relief. The Court of International Trade has exclusive jurisdiction for actions brought by the United States based on 28 U.S.C. § 1582(2) and need not defer its decision since the District Court cannot have jurisdiction where this Court does. *Vivitar Corp. v. United States,* 761 F.2d 1552, 1559 (Fed.Cir. 1985), *cert. denied,* 474 U.S. 1055, 106 S. Ct. 791, 88 L.Ed.2d 769 (1986).

[2] The jurisdiction of the Court of International Trade is exclusive and does not depend on the assertion of jurisdiction by the district courts. *Id.* Our appellate court has held that "it is faulty analysis to look first to the jurisdiction of the district courts to determine whether the CIT has jurisdiction." *Id.* Since the CIT's jurisdiction is narrower than the district courts', "[t]he focus must be solely on whether the claim falls within the language and intent of the jurisdictional grant *to* the CIT." *Id.* at 1559-60 (emphasis in original). Otherwise, the district courts would always have jurisdiction, even where Congress clearly intended to give jurisdiction to the CIT. *Id.* at 1559.

Actions on bonds executed under United States laws generally are heard by the district courts or state courts. 28 U.S.C. § 1352 (1982). The sole exception to this rule is the exclusive jurisdiction of the Court of International Trade under 28 U.S.C. § 1582. That section provides for the CIT to hear civil actions which arise out of import transactions and which are commenced by the United States to, *inter alia,* "recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." 28 U.S.C. § 1582(2). Hence, a

number of statutory requirements must be satisfied for this Court to retain such jurisdiction.

[3] First, the action must be a civil action that arises out of an import transaction. Second, the action must be commenced by the United States. Third, the action must be commenced to collect on a bond relating to the importation of merchandise. As the case before this Court was commenced by the United States, the second requirement is satisfied; defendants acknowledge this. *Defendants Special Appearance and Motion to Dismiss for Lack of Subject Matter Jurisdiction* at 3 ("Defendants' Motion to Dismiss"). Thus, the only questions before this Court are whether the action arose out of an import transaction and whether the warehouse bond related to the importation of merchandise.[4]

Defendants argue that this action did not arise out of an import transaction and that the bond did not relate to the importation of merchandise. *Defendants' Motion to Dismiss* at 3. Though they stored foreign-made goods in their bonded warehouse, defendants claim that, as duty-free merchants, they cannot be classified as importers and their dealings cannot be characterized as "import transactions," since they operate "exclusively in *export.*" *Id.* (emphasis in original).

The trade statutes provide no explicit definitions for "importation" and "import transaction." However, the regulations promulgated by the Treasury Department give two definitions for "date of importation" depending on whether

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[4]Defendants contest the validity of the bond, alleging that Customs has not produced powers of attorney to bind Commodities to the attorneys-in-fact who signed the bond and, as a result the Court should grant defendants' motion to dismiss. *Defendants' Special Appearance and Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction* at 4. The Court need not rule on the validity of the signatures at this time. Since Customs has brought this action to collect on a bond, that part of 28 U.S.C. § 1582 is satisfied.

the merchandise arrives in the United States by vessel or by other means. 19 C.F.R. § 101.1(h) (1989). If it arrives by vessel, the merchandise is deemed imported on "the date on which the vessel arrives within the limits of a port in the United States with intent then and there to unlade such merchandise." *Id.* If it arrives by another mode, the merchandise is considered imported on "the date on which the merchandise arrives within the Customs territory of the United States." *Id.*

In interpreting the trade laws, courts frequently have relied on the ordinary meaning of "importation." *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 121, 43 S. Ct. 504, 506, 67 L.Ed. 894 (1923); *Kee Co. v. United States,* 13 CCPA 105, 109, T.D. 40943 (1925); *Sterling Bronze Co. v. United States,* 12 CCPA 338, 340, T.D. 40487 (1924). *Black's Law Dictionary* defines importation as "the act of bringing goods and merchandise into a country from a foreign country." *Black's Law Dictionary* at 680 (5th Ed. 1979). Justice Van Devanter expanded on this definition in *Cunard.* He wrote that importation

> consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.

Cunard, 262 U.S. at 122, 43 S.Ct. at 507.

Defendants note in their motion to dismiss that the storage of dutiable, foreign-made merchandise in a bonded warehouse, by itself, does not constitute importation into the United States. *Defendants' Motion to Dismiss* at 4. The predecessor to our appellate court long ago stated that "goods in bonded warehouses are not to be considered as imported until a permit of delivery has been issued and they enter into the commerce of the country." *Stone and Downer v. United*

States, 19 CCPA 259, 264, T.D. 45388 (1931) (citations omitted); *cert. denied*, 287 U.S. 619, 53 S. Ct. 20 (1932).

However, the Supreme Court tacitly acknowledged that foreign-made goods in Customs warehouses are imports when it wrote that "*imports* may be stored duty-free for prescribed periods" in bonded warehouses. *Xerox Corp. v. County of Harris, Texas*, 459 U.S.145, 150, 103 S.Ct. 523, 526, 74 L.Ed.2d 323 (1982) (emphasis added). This concept was restated in *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina*, in which the Supreme Court dealt with the issue of foreign-made goods stored in Customs bonded warehouses under 19 U.S.C. § 1555. 479 U.S. 130, 107 S. Ct. 499, 93 L.Ed.2d 449 (1986). Referring to goods stored in a Class 2 warehouse, as the goods in the instant case were, the Court inferred that such goods are importations, but simply are not subject to duties unless withdrawn from the warehouse and injected into the stream of commerce of the United States. *Id.* at 133-34, 107 S. Ct. at 503. Hence, while the Supreme Court has not explicitly held that foreign-made goods in bonded warehouses are imports, the implication that they are is quite clear.

Additionally, in *United States v. John V. Carr & Son, Inc.*, the Customs Court defined imported merchandise as

> *merchandise* that has been brought within the limits of a port of entry *from a foreign country* with intention to unlade, and the word *'importation'* as used in tariff statutes, unless otherwise limited, means merchandise to which that condition or status has attached.

58 Cust. Ct. 809, 813, 266 F. Supp. 175, 178 (1967) (emphasis in original), *aff'd*, 396 F.2d. 1017, 55 CCPA 111, 396 F.2d 1017 (1968), quoting *Porto Rico Brokerage Co. v. United States*, 76 F.2d 605, 23 CCPA 16, T.D. 47672 (1935); and *Procter & Gamble Mfg. Co. v. United States*, 19 CCPA

415, T.D. 45678 (1932). This Court has adopted Webster's definition for the term "unlade." *American Mail Line v. United States*, 6 Cust. Ct. 90, 93, C.D. 435 (1941). It was held to mean "to take the load from; to take out the cargo of; as to unlade a ship." *Id.*, quoting Webster's *New International Dictionary*. Thus, once goods are within the jurisdictional limits of the United States with the intent to discharge, they are imports under this definition.[5] As the goods in this action had already passed into the bonded warehouse, they were well beyond that point.[6]

Defendants argue that they are entitled to special treatment because they are a duty-free store and do not bring goods into the United States for the purpose of injecting them into the stream of commerce. *Defendants' Motion to Dismiss* at 5. They recognize this Court's jurisdiction over actions brought by Customs to collect liquidated damages on an import bond. But they claim that such is not this case because as a duty-free store they are not importers, and the bond is not an "importation bond" subject to CIT jurisdiction under 28 U.S.C. § 1582. *Id.*

The Omnibus Trade and Competitiveness Act of 1988 defines duty-free enterprise as

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[5]Our appellate court's predecessor has held that "unless the contrary clearly appears," an importation is "the bringing of goods within the jurisdictional limits of the United States with the intention to unlade them." *Henry Hollander Co. v. United States*, 22 CCPA 645, 648, T.D. 47632 (1935). See also *Sherwin-Williams Co. v. United States*, 38 CCPA 13, 18 (1950); *American Customs Brokerage Co. v. United States*, 72 Cust. Ct. 245, 253, C.D. 4546, 375 F. Supp. 1360, 1366 (1974).

[6]That is not to say, however, that the goods were subject to duty or tax while in the bonded warehouse. Though technically "imports," foreign-made goods in a bonded warehouse remain exempt from duties and taxes until either they are withdrawn (as has been alleged here) or five years pass from the date of importation. 19 U.S.C. § 1557(a) (1988).

> a person that sells, for use outside the customs territory, duty-free merchandise that is delivered from a bonded warehouse to an...exit point for exportation by, or on behalf of, individuals departing from the customs territory.

19 U.S.C. § 1555(b)(8)(D) (1988). Duty-free merchandise is defined as goods on which no Federal duty or tax has been charged "pending exportation from the customs territory." 19 U.S.C. § 1555(b)(8)(E). The unique nature of a duty-free store is that it sells goods for immediate export from the United States so that its customers need not pay Federal duties and taxes on the goods. There is no mention, however, in either the statutes or accompanying regulations that duty-free establishments are not importers, nor that the goods are not imports while in the warehouse. Logic dictates that before one can export foreign goods from the United States, they must first be imported.

The regulations interpreting the trade statutes define "importer" as "the person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf." 19 C.F.R § 101.1(1) (1989). The statute, regulations and caselaw unequivocally state that if goods held in a bonded warehouse prior to payment of duties and taxes are removed from the warehouse and enter into the stream of commerce of the United States, duties and taxes become due. 19 U.S. C. § 1557(a); 19 C.F.R. § 113.62(a)(ii) (1989); *R.J. Reynolds*, 479 U.S. at 134, 107 S. Ct. at 503; *Xerox*, 459 U.S. at 150, 103 S. Ct. at 526. If such duties and taxes become due on goods stored in Commodities' bonded warehouse because of their injection into the United States commerce in violation of their warehouse bond with Customs, Commodities or its surety would be liable to pay the duties and taxes, as well as any liquidated damages provided for in the bond. As the party liable for payment of Customs duties and taxes, Commodities is rightly classified as an importer. 19 C.F.R. § 101.1(1).

[4] Defendants assert that, since the bond does not refer to importation, it could not logically be a bond "relating to the importation of merchandise." *Defendants' Motion to Dismiss* at 5-6. In *R.J. Reynolds*, the Supreme Court stated that "the central purpose behind customs-bonded warehouses [is] to ensure that federal customs duties are collected." 479 U.S. at 131, 107 S. Ct. at 502. While the bond is not entitled "importation bond," and does not refer to the importation of merchandise, it clearly was designed to deal with instances where duty-free goods have in fact entered into the stream of commerce of the United States without payment of the appropriate duties and taxes. As such, the bond related to the importation of merchandise.

The terms of the bond provide for liquidated damages where merchandise enters the country in violation of the bond. Customs here is seeking to recover unpaid liquidated damages assessed by them because of alleged shortages at the warehouse which Customs claims entered the stream of commerce of the United States. The bond details the parties' obligations regarding merchandise held in Customs bonded warehouses. When Customs believes the goods entered the stream of commerce (or the bond was otherwise violated), Customs is entitled to assess liquidated damages; if they remain unpaid or defendants challenge the assessment, Customs may seek payment in this Court. Duty-free establishments are exempt from duties and taxes so long as they comply with the terms and conditions of their warehouse bond; they are not, however, exempt from the jurisdiction of this Court.

Conclusion

Accordingly, defendants' motion to dismiss for lack of subject matter jurisdiction is hereby denied. Having decided the jurisdictional issue, the Court hereby denies defendants' motion for reconsideration. Defendants' motion for certifica-

tion is also denied pending a final decision on the merits.

755 F Supp 418 (CIT 1991)
No. 89-03-00144

United States Court of International Trade

UNITED STATES OF AMERICA,

Plaintiff,

V

COMMODITIES EXPORT CO. and
OLD REPUBLIC INSURANCE CO.,

Defendants,

Decided January 9, 1991

Customs Service brought action against importer and surety to collect liquidated damages on customs bond. On motion to dismiss, the Court of International Trade, Tsoucalas, J., held that: (1) applicable statute of limitations was six-year statute on actions for money damages brought by the United States and founded on contract, rather than five-year statute on action to collect penalty; (2) statute did not begin to run until after expiration of deadline in notice of demand for liquidated damages; and (3) liquidation of the relevant entries after the notice of demand did not estop the customs service from bringing suit.

Motion denied.

1. Customs Duties #86

Statute authorizing Secretary of the Treasury to fix amount of penalty of a customs bond, "whether for the payment of liquidated damages or of a penal sum," is not a definitional

statute and does not automatically convert liquidated damages into penalties so as to render applicable the five-year statute of limitations for collection of penalties, in suit to collect liquidated damages on bond. Tariff Act of 1930, §§ 621, 623(b)(1), as amended, 19 U.S.C.A. §§ 1621, 1623(b)(1).

2. Customs Duties #86

Action by Customs Service to collect liquidated damages on a bond was governed by six-year statute of limitations for actions for money damages brought by the United States and founded on a contract, rather than five-year statute for collection of penalties; liquidated damages equal to $100 for each failure to comply with bond plus five times duty and tax due on dutiable or taxable merchandise, and $100 plus value of merchandise if goods were not dutiable, were reasonable and did not constitute a penalty. Tariff Act of 1930, §§ 621, 623(b)(1), as amended, 19 U.S.C.A. §§ 1621, 1623(b)(1); 28 U.S.C.A. §§ 2415, 2415(a).

3. Customs Duties #86

Though breach of customs bond occurred, not when importer failed to pay liquidated damages, but when it failed to account properly for all merchandise stored in warehouse, customs service could not bring suit prior to issuance of notice of demand for liquidated damages, and thus statute of limitations did not commence to run until after deadline in notice had expired, provided that there was no unreasonable delay between inspection and issuance of notice. 28 U.S.C.A. § 2415.

4. Customs Duties #86

A period of less than one month between inspection of

bonded warehouse and issuance of notice of demand for liquidated damages was reasonable, and thus statute of limitations on action to collect liquidated damages on Customs bond did not commence to run until 60 days after the notice. 28 U.S.C.A. § 2415.

5. Customs Duties #86

Whether notice of demand for payment of liquidated damages on customs bond was issued before entries were liquidated, subsequent liquidation of the merchandise did not estop customs service from bringing suit for liquidated damages on the bond.

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Walter H. Lubienski and Roger E. Craig, Detroit, Mich., for defendants.

OPINION

TSOUCALAS, Judge:

Defendants, Commodities Export Co. and Old Republic Insurance Co. (collectively, "Commodities"), have moved to dismiss the action by the United States Customs Service ("Customs") to collect liquidated damages on a bond. Defendants claim that the action is time barred because the statute of limitations has expired. Defendants also assert that Customs is barred from suing to collect liquidated damages on the relevant entries because the entries have been liquidated.

Background

The facts of this case were set out in detail in *United States v. Commodities Export Co.*, 14 CIT -, 733 F.Supp. 109 (1990). Briefly, Commodities operates a duty-free store and bonded warehouse. Goods are stored in the warehouse duty--free until sold through the retail store. Pursuant to 19 U.S.C. § 1555 (1982), Commodities executed a Proprietors Warebouse Bond ("bond") in the amount of $50,000 in December 1982. The bond is designed to insure that goods stored duty-free in a bonded warehouse do not enter the stream of commerce of the United States without payment of duties or taxes due thereon.

On February 22, 1983, Customs officials conducted a "spot check" inspection of Commodities' warehouse and found that, in violation of the bond, certain merchandise was improperly marked and other goods were missing. Consequently, on March 21, 1983, Customs mailed to Commodities a Notice of Penalty or Liquidated Damages Incurred and Demand For Payment ("Notice") pursuant to the bond. The Notice states that the importer has sixty days within which to pay. When no payment was forthcoming, Customs filed a Summons and Complaint in this court on March 17, 1989.

Discussion

I. *Statute of Limitations*

[1, 2] As a preliminary matter, the parties do not agree which statute of limitations governs this case. Defendants claim that liquidated damages are penalties and therefore, the applicable statute is 19 U.S.C. § 1621 (1982), which bars such actions if not initiated within five years after the discovery of the alleged offense. In support of this argument, defendants have cited to the Tariff Act of 1930, as amended, 19 U.S.C. § 1623(b)(1) (1982), and Customs' accompanying

regulations.

Section 1623(b)(1) authorizes the Secretary of the Treasury to "prescribe the conditions and form of [a Customs] bond, and fix the amount of penalty thereof, whether for the payment of liquidated damages or of a penal sum." Similarly, Customs' regulations empower the Commissioner of Customs to "[p]rescribe the conditions and form of [a Customs] bond, and fix the amount of penalty, whether for the payment of liquidated damages, or of a penal sum.,, 19 C.F.R. § 113.2(a) (1983). Commodities claims that these two provisions provide clear cut *definitions* of liquidated damages as penalties. The Court sees little justification for Commodities' unique interpretation of the statute and regulation. The statute is not a definitional one, and the use of the word penalty does not automatically convert liquidated damages into penalties, where they otherwise are not.

It is well settled that liquidated damages "are not penalties if they are reasonable and the exact amount of the damages sustained would be difficult to prove." *United States v. Imperial Food Imports*, 834 F.2d 1013, 1016 (Fed.Cir. 1987); *United States v. Lun May Co.*, 12 CIT -, 680 F.Supp. 1573, 1576 (1988); *United States v. Monza Automobili*, 12 CIT -, 683 F.Supp. 818, 821 (1988); *United States v. American Motorists Ins. Co.*, 11 CIT 944, 947, 680 F.Supp. 1569, 1572-73 (1987).[1]

In the instant action, the liquidated damages are equal to $100 for each failure to comply with the bond plus five times the duty and tax due on dutiable or taxable merchandise. If the goods are not dutiable, then the liquidated damages equal

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[1]Liquidated damages were held to be reasonable where they equaled the value of the product plus the estimated duties and taxes. *See Imperial Food*, 834 F.2d at 1016; *Monza*,12 CIT at -, 683 F.Supp. at 821; *Lun May*,12 CIT at -1 680 F.Supp. at 1576.

$100 plus the value of the merchandise. *See* Exhibit A of *Plaintiff's Complaint*. In light of the caselaw and the policy of discouraging foreign-made goods from entering the commerce of the United States without payment of duties and taxes, the Court finds that this provision is reasonable, and does not constitute a penalty on Commodities. Hence, the five year statute of limitations in 19 U.S.C. § 1621 is inapplicable to this case.[2]

Moreover, a number of cases in this court have applied the six year statute of limitations in 28 U.S.C. § 2415 to liquidated damages cases. *United States v. Peerless Ins. Co.*, 12 CIT -, -, 703 F.Supp. 955, 957 (1988); *United States v. Angelakos*, 12 CIT -, -, 688 F.Supp. 636, 637 (1988). The Court here follows those decisions and holds that this action is governed by the six year statute of limitations for actions for money damages brought by the United States and founded upon a contract. 28 U.S.C. § 2415(a) (1988).[3]

[3, 4] The parties also disagree on the issue of when the statute of limitations began to run. The statute bars actions for contract damages unless they are brought "within six years after the right of action accrues." 28 U.S.C. § 2415(a). Thus, the dispute is as to when Customs' right to sue to collect liquidated damages accrued. Defendants claim it was

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[2]Furthermore, this court has held that section 1621 did not apply to a counterclaim by the United States for liquidated damages arising from the breach of a Customs bond. *DiGiorgio v. United States*, 8 CIT 192, 196-97 (1984). There, the court distinguished actions for liquidated damages from "penalty-type proceedings," and allowed the action to go forward based on 28 U.S.C. § 2415(f).

[3]28 U.S.C. § 2415(a) provides in pertinent part:

> ...every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues....

when the Customs officers conducted a spot check inspection on February 22, 1983, and found discrepancies in merchandise. *Motion to Dismiss* at 4. Plaintiff asserts that it had no right of action until after it mailed the demand for payment of liquidated damages on March 21, 1983. *Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment* at 8.

In *United States v. Atkinson*, 6 CIT 257, 575 F.Supp. 791 (1983), Customs mailed a notice to defendant ordering him to redeliver merchandise within five days, in accordance with the terms of the entry bond. In applying 28 U.S.C. § 2415, the court held that the statute of limitations began to run when defendant failed to redeliver the goods five days after the notice was mailed. 6 CIT at 260, 575 F.Supp. at 794. There, the defendant breached the bond by failing to redeliver merchandise in accordance with the bond. In so ruling, the court reiterated the "general rule that 'the statute of limitations begins to run on the date that a cause of action for breach accrues, which is ordinarily the time of the breach of the agreement.'" *Id.*, quoting *Schmidt v. McKay*, 555 F.2d 30, 34 (2d Cir. 1977).

In this case, Commodities allegedly breached the bond by not being able to account for all the goods in their bonded warehouse. The bond does not require that Customs send to importer a notice of demand for liquidated damages. Hence, the breach did not occur when Commodities failed to pay liquidated damages, but rather when Commodities failed to account properly for all the merchandise stored in their warehouse. This occurred on February 22, 1983.[4]

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[4]Indeed, in the government's Complaint it is stated that "[a]s a result of [the spot check] inspection it was determined that Commodities was in default on Condition 2(b) of the bond, as 37 warehouse entries were not marked and segregated by entry number. Shortages in seven (7) entries

Customs contends, however, that the government's right of action did not accrue until after it had sent notice of demand for liquidated damages to Commodities, even though the breach allegedly had occurred already. Congress gave no guidance as to when the right of action accrues. No statutory provision requires that Customs first send notice of demand for liquidated damages to importers before suing in this court to collect. Instead, Customs cites to its regulations for support for this contention.

Part 172 of Customs' regulations deals with provisions relating to notices of liquidated damages. 19 C.F.R. § 172.1(a) (1983) states that, upon breach of "any bond posted with Customs, the principal shall be notified in writing of any liability for liquidated damages incurred by him and a demand shall be made for payment." The issue then is whether Customs has a right of action before such notice is sent; and further, whether Customs can indefinitely extend the statute of limitations by postponing the issuance of the notice.

This court addressed the issue in *United States v. Continental Seafoods, Inc.*, 11 CIT 768, 672 F.Supp. 1481 (1987).[5] That case dealt with a food importer whose merchandise was found to be contaminated. The importer was given fifteen days to try to cure the problem. Eight months later, Customs determined that the food was still unacceptable and issued a notice of refusal of admission, ordering the goods exported within ninety days. The court held that the statute of limitations in § 2415 did not begin to run until the ninety day

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were also discovered during the inspection. As there was no written notification to Customs by Commodities of any shortages, these shortages constituted a default under Condition 5(g) of the bond." *Plaintiff's Complaint* at 3.

[5]The issue also was raised in *Angelakos*, but the court did not reach it because plaintiff's suit was brought within six years of the defendants' actual breach of the bond terms. 12 CIT at -, 688 F.Supp. at 637.

period expired, despite the importer's claim that the statute should run from the fifteenth day after the notice to cure. 11 CIT at 770, 672 F.Supp. at 1483-84. As here, the importer asserted that the government could indefinitely postpone the running of the statute by delaying the sending of the notice of refusal of admission. In holding that the eight month gap between breach and notice was not unreasonable, the court stated that it would "not presume that the government will deliberately withhold the notice of refusal of admission." *Id.*

In the instant action, the Notice was issued on March 21, 1983, less than one month after the inspection. While, the government may not indefinitely postpone the issuance of a demand for payment, the government is entitled to a reasonable time after such inspection during which to calculate the damages. The court finds that the period between the inspection and the issuance of the Notice, to wit, less than one month, does not constitute an unreasonable delay on the part of the government.

Furthermore, Customs regulations dictate that a notice of demand for liquidated damages must be issued to the importer. 19 C.F.R. § 172.1(a). If the government could bring suit immediately upon discovery of alleged discrepancies in merchandise, there would be no reason for the regulations, which serve the useful purpose of administratively notifying importers of their liability, and providing them with an opportunity to respond without resort to the judicial system.[6]

The Court concludes, therefore, that Customs may not bring suit prior to issuance of the notice of demand for liquidated damages. The Notice was issued on March 21, 1983, after which Commodities had sixty days to respond, either by

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[6]Also, the regulations state that, only if liquidated damages are not paid within sixty days after demand is sent will the matter be turned over to the U.S. Attorney's office. 19 C.F.R. § 172.2(a) (1983).

paying or by filing a petition for relief. *Notice*, Exhibit B to *Plaintiffs Complaint; see also* 19 C.F.R. § 172.2(a). Thus, the statute of limitations did not begin to run until after the deadline expired, that is, on May 20, 1983. Since the Complaint was filed on March 17, 1989, it was within six years of the date the right of action accrued and, accordingly, was timely commenced.

B. *All Entries Liquidated*

[5] Commodities also claims that Customs' action may not proceed because the relevant entries have been liquidated, and barring timely protest or reliquidation, liquidation is final and conclusive and may not now be challenged. Defendants assert that, by liquidating Commodities' goods, Customs accepted that they were exported properly and is estopped from bringing suit for liquidated damages. The government admits that the entries were liquidated duty-free, but states that liquidation does not bar this action.[7] Since the demand for liquidated damages was sent prior to liquidation, Customs asserts that "the determination of duty liability does not discharge the liability for the obligation required by the bond." *Plaintiffs Memorandum* at 10.

Defendants cite to our appellate court's ruling in *United States v. Utex Int'l, Inc.*, 857 F.2d 1408 (Fed.Cir. 1988), for the proposition that liquidation is final and conclusive and, "absent timely reliquidation or protest it was final as to all aspects of the entry," including liquidated damages. *Id.* at 1412. In *Utex*, the court refused to allow the government to avoid the finality of liquidation by subsequently issuing a Notice of Refusal of Admission of contaminated shrimp, and later a Notice of Penalty or Liquidated Damages Incurred and Demand For Payment, because the notices were issued after

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[7]According to Customs, the goods were liquidated between April and October 1983. *See* Exhibit E of *Plaintiff's Memorandum*.

liquidation. The court wrote that the "importer, the surety, and the government are bound by and have the right to rely on the finality of liquidation." *Id.* Consequently, the liquidation stood and the government's collection action against the surety was dismissed for lack of jurisdiction.

In *United States v. Toshoku Am., Inc.*, 879 F.2d 815 (Fed.Cir. 1989), the court dealt with a similar set of facts, where imported tuna was found contaminated by the Food and Drug Administration ("FDA"). The FDA issued a Notice of Detention and Hearing, and Customs then issued a Notice of Refusal of Admission. 879 F.2d at 816. Subsequently, Customs liquidated the merchandise and, six months after liquidation, Customs issued a Notice of Penalty or Liquidated Damages Incurred and Demand For Payment. The court stated that the finality of liquidation principle expressed in *Utex* was inapplicable in *Toshoku* because "the Notice of Refusal of Admission was issued prior to the erroneous liquidation of the entry by Customs." *Id.* The court in *Toshoku* stated in a footnote that *Utex* stood for the proposition that "obligations vested prior to liquidation are not comparable to post-liquidation obligations." *Id.* Thus, the obligation to pay liquidated damages arose with the issuance of the Notice of Refusal of Admission, and the subsequent liquidation did not, in itself, preclude the collection suit.

In the present action, Customs issued a Notice of Penalty or Liquidated Damages Incurred and Demand For Payment one month after finding breaches of the bond. It was only *after* the Notice was issued that the goods were liquidated. The obligation to pay liquidated damages arose on March 21, 1983, the date the Notice was issued, and this issuance served to put Commodities and Old Republic on notice that they had breached their warehouse bond. The subsequent liquidation of the merchandise therefore does not preclude this suit.

Conclusion

Since plaintiff brought this action within six years after the right of action accrued, in accordance with 28 U.S.C. § 2415, the statute of limitations does not bar this suit. Moreover, the liquidation of the merchandise does not thwart the suit as it came after the notice of assessment of liquidated damages was issued. Accordingly, defendants' motion to dismiss is denied.

No. 89-03-00144

United States Court of International Trade

UNITED STATES OF AMERICA,

Plaintiff,

V

COMMODITIES EXPORT CO. and
OLD REPUBLIC INSURANCE CO.,

Defendants,

JUDGMENT

The jury having reached a verdict in this matter in favor of plaintiff, the United States; and upon consideration of the filings of plaintiff and defendants,

IT IS HEREBY ORDERED that judgment be entered in favor of the United States against defendants Commodities Export Co. and Old Republic Insurance Co., jointly and severally, in the amount of $6,024.69., this being the amount claimed by the United States in its Complaint ($6,293.96), reduced by the damages assessed against the entry for Marie Brizzard Liqueur (No. 83-100704), to wit, $226.86, and by the duty assessed against the entries for Samovar Vodka (No. 83-100583), to wit, $26.10, and Smirnoff Vodka (No. 83-100620), to wit, $16.31, the latter two entries being domestic products not subject to duty, and it is further

ORDERED that Commodities Export Co. will pay pre-judgment interest, at the rate established under 26 U.S.C. § 6621, from March 21, 1983, the date of the Government's demand for payment of liquidated damages, to the date of the

entry of judgment; and post-judgment interest, from the date of the entry of judgment until the judgment is paid, in accordance with 28 U.S.C. § 1961, and it is further

ORDERED that defendant Old Republic Insurance Co. will pay pre-judgment interest, at the rate established under 26 U.S.C. § 6621, from November 20, 1987, the date of the Government's demand for payment of liquidated damages, to the date of the entry of judgment; and post-judgment interest, from the date of the entry of judgment until the judgment is paid, in accordance with 28 U.S.C. § 1961.

NICHOLAS TSOUCALAS
JUDGE

Dated: May 14, 1991
New York, New York

§ 1555. Bonded warehouses

(a) Designation; preconditions; bonding requirements; supervision

Subject to subsection (b) of this section, buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

(b) **Duty-free sales enterprises**

(1) Duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection.

(2) A duty-free sales enterprise may be located anywhere within-

(A) the same port of entry, as established under section 1 of the Act of August 24, 1912 (37 Stat. 434), from which a purchaser of duty-free merchandise departs the customs territory; or

(B) 25 statute miles from the exit point through which the purchaser of duty-free merchandise will depart the customs territory.

(3) Each duty-free sales enterprise-

(A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory;

(B) if the duty-free sales enterprise is an airport store, shall establish and enforce, in accordance with such regulations as the Secretary may prescribe,
restrictions on the sale of duty-free merchandise to any one individual to personal use quantities;

(C) shall display in prominent places within its place of business notices which state clearly that any duty-free merchandise purchased from the enterprise-

(i) has not been subject to any Federal duty or tax,

(ii) if brought back into the customs territory, must be declared and is subject to Federal duty and tax, and

(iii) is subject to the customs laws and regulation of any foreign country to which it is taken;

(D) shall not be required to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate that the items were sold by a duty-free sales enterprise, unless the Secretary finds a pattern in which such items are being brought back into the customs territory without declaration;

(E) may unpack merchandise into saleable units after it has been entered from warehouse and placed in a duty-free sales enterprise, without requirement of further permits; and

(F) shall deliver duty-free merchandise-

(i) in the case of a duty-free sales enterprise that is an airport store-

(I) to the purchaser (or a family member or companion traveling with the purchaser) in an area that is within the airport and to which access to passengers is restricted to those departing from the customs territory;

(II) to the purchaser (or a family member or companion traveling with the purchaser) at the exit point of a specific departing flight;

(III) by placing the merchandise within the aircraft on which the purchaser will depart for carriage as passenger baggage; or

(IV) if the duty-free sales enterprise has made a good faith effort to effect delivery for exportation

through one of the methods described in subclause (I), (II), or (III) but is unable to do so, by any other reasonable method to effect delivery; or

(ii) in the case of a duty-free sales enterprise that is a border store-

(I) at a merchandise storage location at or beyond the exit point; or

(II) at any location approved by the Secretary before the date of enactment of the Omnibus Trade Act of 1987.

(4) If a State or local or other governmental authority, incident to its jurisdiction over any airport, seaport, or other exit point facility, requires that a concession or other form of approval be obtained from that authority with respect to the operation of a duty-free sales enterprise under which merchandise is delivered to or through such facility for exportation, merchandise incident to such operation may not be withdrawn from a bonded warehouse and transferred to or through such facility unless the operator of the duty-free sales enterprise demonstrates to the Secretary that the concession or approval required for the enterprise has been obtained.

(5) This subsection does not prohibit a duty-free sales enterprise from offering for sale and delivering to, or on behalf of, individuals departing from the customs territory merchandise other than duty-free merchandise, except that such other merchandise may not be stored in a bonded warehouse facility other than a bonded facility used for retail sales.

(6) Merchandise that is purchased in a duty-free sales enterprise is not eligible for exemption from duty under subchapter IV of chapter 98 of the Harmonized Tariff

Schedule of the United States if such merchandise is brought back to the customs territory.

(7) The Secretary shall by regulation establish a separate class of bonded warehouses for duty-free sales enterprises. Regulations issued to carry out this paragraph shall take into account the unique characteristics of the different types of duty-free sales enterprises.

(8) For purposes of this subsection-

(A) The term "airport store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from the customs territory from an international airport located within the customs territory.

(B) The term "border store" means a duty-free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from, the customs territory through a land or water border by a means of conveyance other than an aircraft.

(C) The term "customs territory" means the customs territory of the United States and foreign trade zones.

(D) The term "duty-free sales enterprise" means a person that sells, for use outside the customs territory, duty-free merchandise that is delivered from a bonded warehouse to an airport or other exit point for exportation by, or on behalf of, individuals departing from the customs territory.

(E) The term "duty-free merchandise" means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory.

(F) The term "exit point" means the area in close

proximity to an actual exit for departing from the customs territory, including the gate holding area in the case of an airport, but only if there is reasonable assurance that duty-free merchandise delivered in the gate holding area will be exported from the customs territory.

(G) The term "personal use quantities" means quantities that are only suitable for uses other than resale, and includes reasonable quantities for household or family consumption as well as for gifts to others.

(As amended Oct. 30, 1984, Pub.L. 98-573, Title II, § 211, 98 Stat. 2977; Aug. 23, 1988, Pub.L. 100-418, Title I, § 1908(b), 102 Stat. 1315; Aug. 20, 1990, Pub.L. 101-382, Title 1, § 139(a)(1), 104 Stat. 653.)

§ 1557. Entry for warehouse

(a) Withdrawal of merchandise; time; payment of charges

Any merchandise subject to duty, with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner purchaser, importer, or consignee. Such merchandise may be withdrawn, at any time within 5 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without the payment of duties thereon, or for transportation and rewarehousing at another port or elsewhere, or for transfer to another bonded warehouse at the same port: *Provided,* That the total period

of time for which such merchandise may remain in bonded warehouse shall not exceed 5 years from the date of importation. Merchandise upon which the duties have been paid and which shall have remained continuously in bonded warehouse or otherwise in the custody and under the control of customs officers, may be entered or withdrawn at any time within 5 years after the date of importation for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, under such regulations as the Secretary of the Treasury shall prescribe, and upon such entry or withdrawal, and exportation or shipment, the duties thereon shall be refunded.

(b) Transferral of right of withdrawal

The right to withdraw any merchandise entered in accordance with subsection (a) of this section for the purposes specified in such subsection may be transferred upon compliance with regulations prescribed by the Secretary of the Treasury and upon the filing by the transferee of a bond in such amount and containing such conditions as the Secretary of the Treasury shall prescribe. The bond shall include an obligation to pay, with respect to the merchandise the subject of the transfer, all unpaid regular, increased, and additional duties, all unpaid taxes imposed upon or by reason of importation, and all unpaid charges and exactions. Such transfers shall be irrevocable, shall relieve the transferor from all customs liability with respect to obligations assumed by the transferee under the bond herein provided for, and shall confer upon the transferee all rights to the privileges provided for in this section and in sections 1562 and 1563 of this title which were vested in the transferor prior to the transfer. The transferee shall also have the right to receive all lawful refunds of money paid by him to the United States with respect to the merchandise the subject of the transfer, and

shall have the right to file a protest under section 1514 of this title to the same extent that such right would have been available to the transferor. Notice of liquidation shall be given to the transferee in the form and manner prescribed by the Secretary of the Treasury. A transferee may further transfer the right to withdraw merchandise, subject to the provisions of this subsection relating to original transfers.

(c) Destruction of merchandise at request of consignee

Merchandise entered under bond, under any provision of law, may, upon payment of all charges other than duty on the merchandise, be destroyed, at the request and at the expense of the consignee, within the bonded period under customs supervision, in lieu of exportation, and upon such destruction the entry of such merchandise shall be liquidated without payment of duty and any duties collected shall be refunded.

(d) Withdrawal before payment

Merchandise may be withdrawn for consumption without the payment of the duty thereon if the importer of record or transferee is permitted to pay duty at a later time pursuant to regulations prescribed by the Secretary under section 1505 of this title.

(As amended Jan. 12, 1983, Pub.L. 97-446, Title II, § 201(f), 96 Stat. 2350.)

§ 1582. Civil actions commenced by the United States

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States-

(1) to recover a civil penalty under section 592, 641-(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff

Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.

(Added Pub.L. 96-417, Title II, § 201, Oct. 10, 1980, 94 Stat. 1729, and amended Pub.L. 98-573, Title II, § 212(b)(2), Oct. 30, 1984, 98 Stat. 2983; Pub.L. 99-514, Title XVIII, § 1891(2), Oct. 22, 1986, 100 Stat. 2926.)

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No. 92-801

In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMODITIES EXPORT CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' judgment in favor of petitioners moots the jurisdictional issue raised by the petition.

2. Whether the court of appeals correctly determined that the Court of International Trade possesses exclusive jurisdiction over a suit by the United States to recover on petitioner's warehouse bond.

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COMMODITIES EXPORT CO., PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 972 F.2d 1266. The opinions of the United States Court of International Trade (Pet. App. A16-A29, A30-A41) are reported at 733 F. Supp. 109 and 755 F. Supp. 418.[1]

[1] A related case originally brought before the United States District Court for the Eastern District of Michigan was ordered transferred to the Court of International Trade. See *Commodities Export Co.* v. *United States Customs Service*, 957 F.2d 223 (6th Cir.), cert. denied, 113 S. Ct. 96 (1992).

JURISDICTION

The judgment of the court of appeals (Pet. App. A15) was entered on August 11, 1992. The petition for a writ of certiorari was filed on November 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner operates a "duty-free" store located in Detroit, Michigan, directly adjacent to the Canadian border. Duty-free stores avoid paying duties and taxes normally due at importation or before sale of goods by storing otherwise dutiable or taxable goods in bonded warehouses. See Pet. App. A4, A19. Infractions of customs laws or regulations constitute defaults under the warehouse bond, and may give rise to assessments of "liquidated damages" under the terms of the warehouse bond. See, *e.g.*, *id.* at A19-A20. The United States Customs Service instituted this action before the United States Court of International Trade (CIT) to recover liquidated damages assessed against petitioner and its surety under petitioner's warehouse bond. The assessments were based on a "spot check" of petitioner's warehouse conducted by the Customs Service on February 22, 1983. *Id.* at A20-A21.

The CIT entered judgment on a jury verdict against the defendants for $6,024.69 plus interest. Pet. App. A42-A43. On appeal, petitioner challenged both the CIT's jurisdiction and its holding that the applicable statute of limitations did not bar the government's suit. The court of appeals confirmed CIT's exclusive jurisdiction over the case, but held that the relevant statute of limitations had expired prior to commencement of the action. It therefore reversed the trial court's judgment in favor of the United States. *Id.* at A14.

ARGUMENT

1. The court of appeals' holding—which the United States does not contest here—that the statute of limitations bars this action against petitioner moots petitioner's claim that the CIT's jurisdiction was not properly invoked. The judgment below prevents the United States from maintaining any action against petitioner to collect liquidated damages on the particular assessments at issue in this case. A decision by this Court could thereforc afford petitioner no further relief with respect to the subject matter of the case.

This Court has repeatedly made clear that even where Congress has granted parties the right to appeal to this Court, the Court ordinarily will not entertain such an appeal from a party that has obtained a judgment in its favor in the court below. See, *e.g.*, *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934); *Gunn* v. *University Committee To End the War*, 399 U.S. 383, 390 n.5 (1970).[2] In the only decided case of which we are aware that presented the same issue in the context of a petition for a writ of certiorari, the Court applied the same principle in dismissing the writ, after full briefing and argument, as improvidently granted. *California* v. *Rooney*, 483 U.S. 307, 311-314 (1987). See also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 46 & n.12 (6th ed. 1986).

Remarkably, the petition scarcely addresses this basic jurisdictional issue. Petitioner's glancing acknowledgment of the case-or-controversy requirement, Pet. 5-6,

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[2] This case does not involve exceptional factual or statutory circumstances analogous to those present in *INS* v. *Chadha*, 462 U.S. 919, 929-931 (1983).

suggests that the issue of the CIT's jurisdiction might arise in other cases between the parties. True or not, that is no reason for the Court (which is constitutionally barred from rendering advisory opinions) to address the issue in this case.[3] If the question of jurisdiction arises in a later case which results in a decision adverse to petitioners, they will of course be free to ask this Court to review the issue at that time.[4] In *this* case, a decision by this Court that the court of appeals misconstrued the CIT's jurisdiction would lead to nothing more than an affirmance, on different grounds, of the court of appeals' judgment in favor of petitioner.

2. Even if the issue were not moot, the decision would not merit review because the court of appeals' decision upholding the CIT's jurisdiction was correct.

Congress has granted the CIT exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United

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[3] Although we find the proposition dubious, we think it unnecessary for the Court to consider whether the potential effect of an unfavorable jurisdictional ruling on later cases involving an otherwise successful petitioner would be sufficient to allow the Court to assert jurisdiction, in an appropriate case, within the limits of Article III of the Constitution. See, *e.g.*, *Deposit Guaranty Nat'l Bank*, 445 U.S. at 333-334. This case presents no feature which would justify making an exception to the Court's normal prudential rule.

[4] It is true that, as we pointed out in our brief in opposition in *Commodities Export Co.* v. *United States Customs Service*, *supra*, the specific holdings involved in the Federal Circuit's decision on jurisdiction in this case will presumably be given preclusive effect in later litigation between the parties. See 91-2063 Gov't Br. in Opp. at 7 n.7. But that result will merely prevent relitigation of the issue in the lower courts; it will not affect petitioner's ability to seek review in this Court if and when the lower courts render a judgment adverse to petitioner. Cf. *California* v. *Rooney*, 483 U.S. at 312-313 & n.2 ("the law-of-the-case doctrine provides no justification for our granting review at this stage").

States * * * to recover upon a bond relating to the importation of merchandise." 28 U.S.C. 1582(2). In holding that petitioner's activities in bringing merchandise into the United States for storage in its bonded warehouse constituted "import transaction[s]" and "importation" for purposes of the statute, Pet. App. A7-A9, the court of appeals properly interpreted the statutory language in accordance with its ordinary meaning. As the court pointed out, *id.* at A8-A9, the terms of petitioner's bond deal with the "documentation and manipulation of imported merchandise in [petitioner's] warehouse." They also "ensur[e] payment of duties on imported merchandise in the event those duties become payable"—as, for example, in this case. *Ibid.* Moreover, the court of appeals' interpretation is consistent with the language of this Court's prior decisions. See *R.J. Reynolds Tobacco Co.* v. *Durham County*, 479 U.S. 130, 134 n.3 (1986) ("[g]oods may remain in a customs-bonded warehouse for up to five years from the date of importation without payment of customs duties"); *Xerox Corp.* v. *County of Harris*, 459 U.S. 145, 150 (1982) ("Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods.").[5]

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[5] As the court of appeals correctly observed, Pet. App. A7-A8, *Stone & Downer Co.* v. *United States*, 19 C.C.P.A. 259, 264 (1931), cert. denied, 287 U.S. 619 (1932), is not to the contrary. *Stone & Downer* dealt with the time at which goods are considered "imported" for purposes of assessing duties against them. Here, in contrast, the issue is what sort of cases should come within the CIT's broad grant of exclusive jurisdiction over import-related cases. See Pet. App. A8. Of course, even if the decisions were inconsistent, a decision by the Federal Circuit superseding a decision of its predecessor would not present a conflict requiring resolution by this Court.

Thus, the court of appeals correctly held that the assessments at issue here "aris[e] out of an import transaction" and involve "a bond relating to the importation of merchandise." That determination would warrant no further review, even if the question were properly presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner,

V

THE UNITED STATES,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Reply of Commodities Export Co. To Government's Brief in Opposition

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No. 92-801

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMODITIES EXPORT CO.,

Petitioner,

V

THE UNITED STATES,

Respondent,

REPLY OF COMMODITIES EXPORT CO. TO GOVERNMENT'S BRIEF IN OPPOSITION

The Government's judgment for damages against Petitioner Commodities Export Co. ("Commodities") was reversed by the Federal Circuit (A4)[1] "[b]ecause the United States did not file its action within the six year statute of limitations...."

The Federal Circuit also specifically concluded that (A14): "The Court of International Trade ["CIT"] properly asserted jurisdiction over this action."

The Government now argues that this Court is without jurisdiction because Petitioner prevailed below. This argu-

[1]References to page numbers of the Appendix contained in Commodities' Petition for Writ of Certiorari are preceded by "A" followed by the page numbers. Thus, "A4" is a reference to page 4 of the Appendix in Commodities' Petition for Writ of Certiorari.

ment is both factually and legally flawed.

As the record below amply demonstrates, this case was never about $6,024.69 in damages. The central issue below was the jurisdiction of the CIT over this case and *a fortiori* over the entire duty-free industry. Indeed, Commodities' initial response to the Government's complaint was a motion to dismiss based on the absence of jurisdiction in the CIT (A21).

Deposit Guaranty Nat'l Bank v Roper, 445 US 326 (1980) relied on by the Government in fact provides the basis for a finding of jurisdiction in this case. To be sure, the Court observed (at 333) that: "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." (Citations omitted.) But even this language without more, cuts in favor of Commodities here who most assuredly did not receive the relief it sought.

The *Deposit Guaranty* court examined *Electrical Fittings Corp v Thomas & Betts Co,* 307 US 241 (1939) in which although a claim of patent infringement was denied the patent was found to be valid. The party charged with the infringement appealed. "Respondents filed a motion to dismiss the appeal 'based on the ground that the appeal can raise no questions not already moot because of the fact that the [petitioners] have already been granted in the dismissal of the bill all the relief to which they are entitled.'" *Deposit Guaranty,* 334. This is precisely the argument made by the Government here. The Court of Appeals in *Electrical Fittings* accepted the argument. The Supreme Court did not. Its reasoning was quoted with approval in *Deposit Guaranty,* 335:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the

> decree. But here the decree itself purports to adjudge the validity of [the patent], and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this court has, to entertain the appeal, not for the purpose of passing on the merits but to direct the reformation of the decree." 307 U.S., at 242 (footnotes omitted).

In *Deposit Guaranty* as in *Electrical Fittings*, the mootness argument was rejected. The logic on which those decisions were based is equally applicable here.

Public Service Commission v Brashear Freight Lines, Inc, 306 US 204 (1939) relied on by the Government has no application here. Injunction sought by plaintiffs was denied. Defendants appealed because the trial court refused to consider their counterclaim. This Court decided (at 206) that defendant "as the successful party below has no standing to appeal from the decree denying the injunction." (Citations omitted.)

Here, neither the trial court nor the court of appeals refused to consider the critical jurisdictional issue raised by Commodities. Instead, that issue was considered and decided against Commodities. *New York Telephone Co v Maltbie*, 291 US 945 (1934) adds nothing to *Brashear Freight* and *Gunn v University Committee To End the War*, 399 US 383, 390 n 5 (1970) cited by the Government, repeats subjunctively, the holding in *Brashear Freight*.

California v Rooney, 483 US 307, 311-314 (1987) relied on by the United States as instructive in the case at bar is no assistance to the Government, because, as this Court observed (at 314): "As it stands, we have no way of knowing what the California Supreme Court's position on the issue of trash

searches currently is."

In the case at bar, the position of the court below on the jurisdiction of the CIT over duty-free stores is not in doubt. It has been litigated and decided. The propriety of that decision is now before this Court.

More to the point on the issue raised here is *International Broth of Elec Workers v ICC*, 862 F2d 330, 334 (DC Cir 1988) in which the Court observed that: "This case comes to us in a somewhat unusual posture, because the ICC upheld the union's position on the merits of the arbitration award."

Because the main focus of the union's defense was *lack* of jurisdiction and because it lost on that issue, appellate review was deemed appropriate, *International Broth of Elec Workers*, 334:

> Because of the ICC's decision to review arbitration awards, the union will be subject to agency review in future cases involving disputes over employee protective conditions.
>
> *This injury is similar to interests held to be sufficient to confer appellate standing on an otherwise prevailing party.* (Emphasis added, citations omitted.)

That decision is dispositive of the precise issue presented here. The finding of jurisdiction in the CIT over duty-free stores spread throughout the nation is at least as compelling as the jurisdictional issue in *International*. Had the Federal Circuit decided the issue of the CIT's subject matter jurisdiction in Commodities' favor, it would never have gotten to the Statute of Limitations issue.

The merits, addressed briefly by the Government, are responded to in Commodities' Petition for Writ of Certiorari.

CONCLUSION

This is the *first* duty-free store case ever filed in the CIT.

Pursuant to SCR 10.1(c), the Federal Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." Duty-free stores operate exclusively in export. The Federal Circuit's jurisdictional ruling has fundamentally and erroneously redefined the entire industry as "importers" conducting "import transaction[s]" with bonds relating to the "importation of merchandise" as required by 28 USC 1582(2).

For the foregoing reasons and for those set forth in Commodities' initial Petition, the writ of certiorari should issue to review the Federal Circuit's ruling affirming the subject matter jurisdiction of the CIT under 28 USC 1582(2) as it apples to duty-free stores.

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